BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of	)	
	)	
Joint Application by SBC Communications	)	
Inc., Southwestern Bell Telephone Company,	)	
and Southwestern Bell Communications	)	CC Docket No. 00-217
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of	)	
In-Region InterLATA Services	)	
in Kansas and Oklahoma	)	

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

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Sprint Communications Company L.P. hereby petitions to deny the above-captioned application of Southwestern Bell ("SWBT") for authorization to provide in-region, interLATA services in Kansas and Oklahoma.[1] The application fails to meet the requisite standards of Section 271 for either state and cannot be granted at this time.

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[1] See Joint Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Dkt. No. 00-217 (filed Oct. 26, 2000) ("SWBT Br."). Unless otherwise indicated, all materials cited in this petition are contained in the record of Docket No. 97-SWBT-411-GIT before the Kansas Corporation Commission ("KCC") and Cause No. PUD 97-560 before the Oklahoma Corporation Commission ("OCC"). Where possible, citation to the appropriate record appendix and tab is provided.

I. INTRODUCTION AND SUMMARY

The application comes at a pivotal moment in the telecommunications evolution. Industry participants along with their financiers are learning just how difficult local entry is. Many small CLECs are simply unable to raise additional capital needed to sustain operations and planned construction. At the same time, long distance companies have made it plain that the consumer long distance business, on a stand alone basis, will not endure.

While there has been some lip service to the consumer value of bundled offerings, the events of the past year should make it crystal clear that, most especially for residential voice services, local and long distance services are a natural bundle. The success of Verizon in New York and SWBT in Texas, with all due respect to these companies, cannot really be the result of stunning, indeed unprecedented, marketing skills. Rather, the dramatic penetration rates of these companies in their first months of entry largely reflect consumers' desire to buy these products together. Sprint, with its own local telephone operations, has known this for a long time.

Given these fundamental facts, it should be clear that fair and efficient competition to provide the bundle can only occur if the Bell Companies are truly required to open their local markets to new entry. Absent economic opportunities to offer local service (and not simply arbitrage or the exploitation of regulatory artifices), telecommunications companies will be forced out of competition for the bundle of services.[2] In turn, they will forego serving residential long distance customers on a stand-alone basis.

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[2] See Declaration of Carl Shapiro at 10, Attached to Sprint's Petition to Deny, Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, CC Dkt. No. 97-208 (filed Oct. 20, 1997).

The question posed by this application, then, is really quite straightforward: Is the Commission willing at this juncture to simple cede away the residential markets to the Bell Companies? For surely if the FCC does not fully enforce the provisions of Section 271, then the BOCs will control not only the provision of local residential service within their regions, but long distance services as well.

SWBT's application to provide interLATA services in Kansas and Oklahoma simply does not meet the rigors of Section 271, both as a matter of statute as well as prior FCC construction. While accusing the Commission of having "raised the bar" in the past, SWBT is in reality asking the Commission now to lower it. Under prior Section 271 precedents, the Commission cannot grant this application for the reasons discussed below.

II. THE LOCAL MARKETS IN KANSAS AND OKLAHOMA HAVE NOT BEEN OPENED.

The fundamental question, of course, is whether the local markets have been irreversibly opened in Kansas and Oklahoma. They have not. SWBT's brief marvels at the amount of CLEC activity in these states, and prominently features Sprint as one of two featured CLECs in Kansas. SWBT Br. at 11. But while Sprint has *attempted* to enter Kansas local markets and has some nascent commercial activity there, its competitive efforts, thwarted by SWBT, do not yet constitute a full commercial alternative for Kansas consumers. More broadly, SWBT has exaggerated its characterization of the competitive entry in the two states.

A. There Is An Insignificant Amount Of CLEC Activity In Both States.

SWBT greatly exaggerates the amount of competitive entry in Kansas, and omits significant findings by the KCC Staff and their consultants, Snavely King.[3] The Staff found, for example, that SWBT had incorrectly identified the number of resale CLECs, the number of facilities-based CLECs and significantly, the number of residential customers served competitively on a facilities-basis.[4] In addition, SWBT is uncharacteristically silent about the findings of Snavely King regarding the paucity of CLEC activity in the state. Indeed, in direct contradiction to SWBT's erroneous claims that Kansas and Oklahoma are proportionately more competitive than Texas, the Staff's Consultant found that competition was disproportionately smaller in Kansas than in Texas: "SWBT's Kansas operations have only 14.3 percent of the lines as Texas, but the CLEC activities are proportionately even smaller. Between December 1999 and May 2000, SWBT responded to only 6.6 percent the number of CLEC orders in Kansas as in Texas." Snavely King Report at 10. Further, not only has SWBT misstated the overall level of activity, but it is clear that "although resale is the dominant form of CLEC competition in both states [of Texas and Kansas], this dominance is more pronounced in Kansas, accounting for 97.4 percent of all orders…." Id.

Indeed, for both Oklahoma and Kansas, SWBT's method of "counting" CLEC activity systematically introduces substantial exaggeration. SWBT offers two ways of counting. First, it

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3 Staff's Recommendation on SWBT's Kansas 271 Application, Section IV, Consultants' Report on SWBT Performance Measures (KCC Aug. 21, 2000) (App. C, tab 259) ("Snavely King Report").

4 Staff's Recommendation on SWBT's Kansas 271 Application, Section I, Checklist Compliance at 3 (KCC Aug. 21, 2000) (App. C, tab 259) ("Kansas Staff Recommendation").

applies a factor to the number of interconnection trunks to derive CLEC voice grade equivalents. But there can be little question that many of these trunks carry ISP traffic. Nor is it clear that SWBT has counted only operational trunks, rather than simply those installed. And as AT&T demonstrated to the KCC, SWBT's own interconnection policies requiring CLECs to interconnect inefficiently at multiple points within the same LATA necessarily means that no factor can fairly assume "efficient" utilization of trunks -- SWBT itself has precluded that result! Further, it is clear from the Kansas record that this methodology in fact results in greatly exaggerated levels of competitive activity. Whereas SWBT claims CLECs serve upwards of 291,000 access lines in Kansas, the Staff Report found only a fraction of that number (129,000). Kansas Staff Recommendation at 3.

The OCC did not undertake to tally its own numbers and instead relied on SWBT's own submissions. It is evident that material factual errors were made. In Cox's post-hearing motion, Cox submitted evidence demonstrating that two of the three carriers identified by the OCC as offering facilities-based residential service do not in fact offer residential service. Cox's Motion to Modify Order No. 445180 at 2 (OCC Oct. 9, 2000) (App. C, tab 277). The OCC disposed of this evidence not on its merits but rather on the basis of timeliness. SWBT's brief to the FCC relies on Brooks and Logix as facilities-based residential service providers, notwithstanding Cox's uncontroverted evidence showing otherwise. SWBT Br. at 18. Most certainly, the FCC is free to consider substance over form in this proceeding. The OCC's Order also ignores evidence submitted by AT&T that SWBT had greatly overestimated the number of facilities-based lines served by CLECs. In fact, AT&T showed that "98.6 per cent of the supposed access line losses alleged by SWBT are mere estimates based on inappropriately converting *all* interconnection trunks into access line equivalents without any regard for how the trunks are used." Direct Testimony of Steven E. Turner on Behalf of AT&T at 13 (OCC Aug. 17, 2000) (App. C, tab 196) ("Turner Direct Test."). AT&T's witness detailed a significant number of reasons demonstrating the unreliability of SWBT's reported figures, but these were summarily dismissed by the OCC. And as AT&T documented, the only reliable method for evaluating competitive activity in Oklahoma is to measure traffic. Id. at 5. Looking at traffic measures, AT&T showed that CLECs' traffic represents only 0.75% of local usage in the state, id., and further, that nearly three-fourths of what CLEC minutes exist are ISP-bound minutes or serve some other type of customer that terminates disproportionately large amounts of traffic. Id. at 6.[5]

SWBT's alternative method for generating CLEC numbers is based on listings in the E911 database. Even with due diligence, Sprint has been unable to discern the precise reason why use of this database introduces such inflated numbers, but its use systematically more than doubles the number of CLEC lines and customers without any explanation. See, e.g., discussion at 8, *infra*. Sprint urges the Commission to require SWBT to make a full explanation on the record how these counts are performed since they are facially unreasonable and unreliable.

B. SWBT Cannot Meet Track A Requirements In Kansas.

Based upon the numbers reported by the Kansas Staff, there were a mere five residential customers being competitively served on a facilities-basis in that state as of August 2000.

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[5] SWBT's reported numbers are not only contradicted by the state records, they also stand in colorful contrast to SWBT's reported data on the performance measurements, where for many measures there is an insufficient number of observations or even none. Again, this is inconsistent with SWBT's portrayal of raging levels of competitive activity.

Kansas Staff Recommendation at 3. SWBT thus fails to meet the requirements of Section 271(c)(1)(A) for its Kansas application.

Implicitly accepting this fundamental flaw identified by the Kansas Staff, SWBT claims that it qualifies under Track A based on numbers it now produces for two CLECs ostensibly offering facilities-based service to residential customers: Global Crossing/Frontier and Sprint. Sprint can of course address only its own activity. Based on this, it is clear that Sprint's activity in Kansas as of the date of SWBT's filing with the FCC is not sufficient to establish Track A eligibility. Though the Commission has concluded that it will not "require any specified level of geographic penetration by a competing provider" with respect to Track A,[6] the Commission has appropriately ruled that "there must be an actual commercial alternative to the BOC in order to satisfy Section 271(c)(1)(A)."[7] While never having had to quantify the concept of *de minimis* CLEC activity such that it is not cognizable under Track A, the Commission has explicitly recognized that "there may be situations where a new entrant may have a commercial presence

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6 See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶ 76 (1997) (citation omitted) ("Michigan Order"). This nonetheless remains a crucial factor under the public interest requirement of Section 271.

7 Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, 12 FCC Rcd 8685, ¶ 14 (1997) (citation omitted) ("Oklahoma Order"), aff'd, SBC Communications, Inc v. FCC, 138 F.3d 410, 415, 416 (D.C. Cir. 1998) (affirming FCC's interpretation of "competing provider" as requiring "an actual commercial alternative" and expressing "doubt that appellant's interpretation, even if adopted by the Commission, would be thought reasonable").

that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"[8]

SWBT claims that Sprint provides facilities-based services to residential consumers in Kansas. Using numbers it creates from interconnection trunks and E911 listings, SWBT misstates Sprint's presence in Kansas. These errors are discussed below. See generally, Affidavit of W. Richard Morris, appended as Attachment 1.

The only local residential service to which SWBT can be referring is Sprint ION.[9] Sprint ION, in its various phases and offerings, may include an integrated offering of a variety of services, including local service, toll service, and broadband data services over a common platform. It requires equipment at the customer premises and associated network equipment, including DSLAMs collocated at SWBT's facilities.

For many months in portions of Johnson and Wyandotte Counties, Kansas, Sprint has been providing Sprint ION service to a limited number of customers *on a non-commercial basis* in preparation for a full commercial offering of ION in Kansas. Morris Aff. ¶¶ 6-7. Initially, conducting alpha testing using only Sprint employees and other "friendly" users, Sprint thereafter established beta testing in early Winter 1999-2000. Id. ¶¶ 8-9. As a condition to their participation in the testing, both types of test customers were required to maintain their local exchange service with SWBT in case they experienced technical problems with ION. Id. ¶ 10.

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8 Michigan Order ¶ 77.

9 Sprint does provide local phone service as an incumbent local exchange carrier in Kansas, but by definition, this is outside SWBT's territory. SBC (Smith-Johnson Aff. ¶ 27) is also incorrect in asserting that Sprint ION is an outgrowth of its ILEC service. Morris Aff. ¶ 5.

Throughout the Spring, Summer and early Fall of 2000, these Sprint ION residential users continued to be treated as non-commercial customers and the large majority of them continued to subscribe to SWBT for local service. Id. In no instance were these users billed for monthly ION service, including the local component of ION. Id. ¶ 11. It was not until October 2000 that Sprint began to bill the full complement of Sprint ION services, including local service. At this time, Sprint also began the process of porting over the bulk of those residential ION customers who were still taking local service from SWBT. This time-consuming process is still underway. Sprint did not send *any* bills for local monthly service to residential ION users until October 20, 2000 -- a mere six days prior to SBC's filing. Id. ¶ 12. Of the 173 residential ION customers in Kansas as of October 20, 56 were sent bills before SWBT filed its Section 271 application for Kansas. Id. By the date SWBT filed, there were 184 local Sprint ION users in Kansas. All of these customers had originally signed up for service during the pre-commercial stages of Sprint's entry in Kansas before billing for monthly ION service had commenced. Equally significantly, 104 still subscribed to SWBT's local service and were still awaiting porting as of October 26, 2000. Id.

While Sprint is now actively marketing Sprint ION in portions of Johnson and Wyandotte Counties, Kansas, and believes in the ultimate commercial success its service will one day enjoy, it is simply wrong to identify Sprint ION activity as meeting the test of an "actual commercial alternative" at the time SBC filed its application. The very few numbers of Sprint employees and other former non-commercial customers who were sent bills in the several days prior to the instant application represent *de minimis* access lines in contrast to SBC's controlled access lines in the state.[10] And even if every ION user at that point were to have become an actual active paying customer at that time, the numbers would still be too small.[11] And as the Commission has steadfastly held, SBC must show compliance as of the date its application is filed. See, e.g., Michigan Order ¶¶ 49-54.

Not only are these numbers small, the fact that Sprint ION users maintained their local service with SWBT establishes that SWBT faced no "actual commercial alternative" over the relevant time period under prior Commission rulings. As discussed above, 60% of all Sprint ION users on October 26 were still SWBT local telephone subscribers. The Commission has already observed that where a second service is not displacing the BOC's local service, but merely being purchased by some users *in addition to* the incumbent service, then "the two services are not competing with each other." See Second Application of BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, ¶ 31 (1998) ("Louisiana II Order"). Thus, any customer count cannot include those Sprint ION customers who maintained their phone service with SWBT, which, as observed above, constitutes the large majority of them at the relevant date.

SWBT's application for Kansas, then, is no different than a number of other Section 271 applications that have been filed with and rejected by the FCC. Like SWBT's efforts in Oklahoma in 1997, its Kansas application does not meet the requirements of Track A and is

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10 These customers represent less than .006% or six hundred- thousandths of the residential access lines served by SWBT in Kansas. See 1999 FCC Statistics of Communications Common Carriers, Table 2.4 (IAD 2000) (showing access lines by type of customer for reporting local exchange carriers as of Dec. 31, 1999).

11 In this case, the number of residential customers served by Sprint ION rises to .02% or two ten-thousandths of the lines controlled by SWBT in Kansas.

ineligible to proceed under Track B.[12] SWBT plainly has received qualifying requests from companies for interconnection agreements that, when fully implemented, will result in the provision of the kind of service described in Section 271(c)(1)(A). However, none of these agreements alone or in the aggregate has produced facilities-based competitive provisioning for residential customers. Lacking a true commercial alternative for residential consumers,[13] Kansas markets thus remain in the "ramp-up" period that Congress contemplated in Track A.[14]

The requirement for "facilities-based" competition in Section 271(c)(1)(A) applies independently to both classes of customers identified in the statute -- business and residential -- as a matter of law. Notwithstanding SWBT's gross mischaracterization of the law (SWBT Br. at n.28), the FCC expressly declined to rule on this legal issue previously. See Louisiana II Order ¶ 48 (while suggesting that there may be policy considerations that would counsel against adhering to the literal terms of the statute, "that is not the case presented by this application. Thus, we do not conclude whether BellSouth has satisfied the requirements of Track A…."); see also Michigan Order ¶ 85 n.190 ("we need not and do not reach the question of whether it is

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12 See Oklahoma Order ¶¶ 13-22; Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶ 57 (1997) ("South Carolina Order").

13 SBC Communications, Inc., 138 F.3d at 415-16 (upholding FCC's interpretation of "competing providers" as requiring an actual commercial alternative to the RBOC's local telephone exchange service).

14 Oklahoma Order ¶¶ 43-46 (1997) (Congress recognized "that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements").

sufficient under section 271(c)(1)(A) for a competing provider to provide local service to residential subscribers via resale….").

Sprint respectfully submits that Section 271(c)(1)(A) is unambiguous on this point. In order to qualify as a Track A competing provider, there must be some CLEC serving a majority of its residential customers with its "own facilities." As a legal matter, Section 271 exhibits Congress' explicit preference for facilities-based entry.[15] The subsection specifically sets forth both classes of customers as the intended beneficiaries of facilities-based local competition. The first sentence of subsection 271(c)(1)(A) requires that the BOC show that it is "providing access and interconnection … to unaffiliated competing providers of telephone exchange service to residential and business subscribers." The second sentence defines that "such telephone exchange service" -- *i.e.*, the services that the "competing providers" are extending to both residential and business subscribers -- must be offered either "exclusively over their own" facilities, or "predominantly over their own" facilities "in combination with resale." The explicit reference in the second sentence to "such telephone exchange service" (especially set out as service distinct from "resale") makes clear that the service provided to each class of customers must be provided over the competitors' own facilities.[16]

This reading also flows as a matter of policy. Both business and residential customers should be able to enjoy the benefits from the 1996 Act in the form of facilities-based

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15 See Oklahoma Order ¶¶ 41-43.

16 Indeed, had Congress been indifferent to whether residential customers were served by competitive facilities the subsection could have been and no doubt would have been written very differently. In fact, there would have been no need to even address residential services in a subsection labeled "presence of a *facilities-based* competitor."

competition. The legislative history confirms this. The Conference Report discusses at length the "meaningful facilities-based competition" made possible by the fact that "cable services are available to more than 95 percent of United States homes."[17] As the Conference Report concludes, "[s]ome of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."[18]

To assert otherwise is to assert that Congress wanted business customers to have a real competitive choice but did not care enough to insist on meaningful alternatives for residential consumers. Given that the very essence of Section 271 is to ensure independent, facilities-based commercial alternatives, this alternative would most certainly undercut the very intent of the provision. Also, because the Commission has permitted the lease of UNEs to constitute competitive facilities under this Section, any further diminution in the Section's requirements would relegate most residential customers to the limited benefits of resold "competition" only. It also would reward BOCs for delaying the availability of UNEs, primarily the UNE-platform and UNE loops, as SWBT has done here. In both states, SWBT refused to make binding the x2As under which UNEs are fully accessible until *days* before it filed its 271 application.

SWBT also seems to argue alternatively that it satisfies Track A because Birch Telecom provides facilities-based service to business customers and residential customers via resale. Implicit in this assertion is an argument that the requirement for facilities-based service can be

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17 H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 160.

18 Id. (emphasis added).

met by showing a facilities-based CLEC offering service over its own facilities to business customers but resale service to its residential customers. Presumably, SWBT is suggesting that Section 271's requirement that the CLEC provide its services "predominantly or exclusively over its own facilities" can be met by looking at a particular CLEC's service overall.[19] But even assuming *arguendo* it could suffice to show that a competing provider was providing service to its collective classes of customers predominantly over its own facilities (which it cannot), SWBT has not made this showing either. The only CLEC SWBT identifies as satisfying this implicit standard is Birch Telecom. SWBT Br. at 16. But in reviewing the actual numbers SWBT reports for Birch Telecom in Kansas, it would appear that Birch Telecom offers its services mostly by resale.[20] SWBT Br., Smith-Johnson Aff., Attachment F. ¶ 7. Track A has thus not been satisfied and Kansas remains in the "ramp-up" period.

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Kansas City is of course Sprint's headquarters (although SWBT is the incumbent LEC there). With broad and exceptionally positive name recognition, and an exciting new product offering in Sprint ION, one would most logically expect that Sprint's entry there would reflect

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[19] The Commission has construed Track A to be met by combining the facilities-based offerings of more than one provider, some of which may serve only one class of customer. Michigan Order ¶¶ 82-85. Because the issue therein resolved still assured Michigan consumers of facilities-based providers for each business and residential class of consumers, that decision does not inform the instant one.

[20] Just last week Birch announced that it is laying off 7% -- or 138 -- of its employees, including 90 from its Kansas City headquarters as "the result of a decision to curb growth until the financial markets become less uneasy about telecommunications firms." Suzanne King, Birch Telecom to Curb Growth, Cut 138 Workers; Executive Says Downturn Caught Firm Offguard, Kansas City Star, Nov. 11, 2000, at C1.

relative ease. Instead, Sprint has been delayed and deterred by SWBT's own actions and inactions. As described more fully in Section IV, *infra*, Sprint and other CLECs have been thwarted by SWBT's provisioning of necessary inputs, including the failure to provide nondiscriminatory access to DSL-capable loops, collocation, prices, and OSS. And as Section III, below explains, the state procedures used to require and evaluate SBC's 271 compliance inevitably led to substandard results. Until the local market entry conditions improve, no interLATA authority should be granted.

III. THE STATE PROCEEDINGS ON CHECKLIST COMPLIANCE DID NOT UTILIZE THE TYPES OF CREDIBLE FACT FINDING PROCEDURES THAT THE FCC HAS SAID ARE ENTITLED TO DEFERENCE.

As detailed in this section, the Commission has no reliable state record upon which to help determine SBC's compliance with Section 271's checklist. The state processes did not use reliable fact finding procedures and contain numerous shortcuts to which fundamental issues were sacrificed.

Congress entrusted this Commission with the exclusive power to grant or deny BOC applications filed under Section 271 of the Communications Act.[21] While the FCC alone bears the statutory responsibility to determine whether or not the requirements of Section 271 have been met, the Commission must "consult" with the relevant state commission on the facts relevant to such a determination. The specific task set out for the states is one of fact finding. See Section 271(d)(2)(B) (state commission consultation assists the Commission to "verify the compliance of the [BOC] with the requirements of subsection (c)"); 47 U.S.C. § 271(d)(2)(B).

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[21] See 47 U.S.C. § 271(d)(3) (granting authority to the FCC to approve or deny BOCs' Section 271 applications).

Thus, pursuant to the statute, the state role is to make findings of fact concerning the presence of facilities-based competitors and whether each element of the checklist is actually being satisfied.

Given the inherently factual nature of these questions, sound legal process requires the use of evidentiary-type hearings to develop credible, tested findings of fact. The FCC has expressly recognized that given the 90-day time limit on FCC consideration of applications filed pursuant to Section 271, the states have a critical role to play in the Section 271 process to the extent they "develop a comprehensive factual record" concerning BOC compliance. Michigan Order ¶ 30. While recognizing that the FCC is the body that must make the necessary findings of fact, the Commission has urged parties to raise issues of fact in the state proceeding where possible, "where such views can be adequately addressed by other interested parties and subjected to cross-examination." South Carolina Order ¶ 27.

The state regulators as a group have explicitly accepted this responsibility with recognition of the crucial need for full and fair exposition of the factual issues through comprehensive proceedings. While SWBT emphasizes Kansas' adoption of a 1996 NARUC resolution to require 90-day review periods for Section 271 applications (SWBT Br. at 3-4), it omits the subsequent refinement in the state regulators' approach as represented by the NARUC Resolution in Summer 1998 to adopt the Section 271 Template.[22] In adopting the 271 Template, the NARUC acknowledged that the "FCC has relied heavily on state commissions to develop the factual records upon which the FCC's ultimate decisions may in significant measure be based." Id. The 271 Template was adopted "to be helpful to state commissions in conducting a thorough

[22] NARUC Resolution (July 29, 1998) <http://www.naruc.org/Resolutions/summer98.htm> (adopting "A Section 271 Template") ("271 Template") (prepared by the NARUC Communications Committee and Staff Subcommittee for use by state commissions).

and orderly evaluation of any Section 271 application made in their jurisdiction." Id. The 271 Template itself is all the more explicit:

> Section 271's time line and specificity, especially the fact-oriented "competitive checklist," have produced an especially great emphasis on the State commission's role in developing a thorough factual record upon which the FCC's ultimate decision may in significant measure be based. The better job the state commission is able to do developing a record, the more helpful that record will be to the FCC. *Also, it is probably fair to say the more thorough the State commission's record development, and the more grounded the State commission's recommendation is in that record, the more weight will be given the State commission recommendation by the FCC.*

271 Template at iii (emphasis added).

In fact, the FCC has been explicit that the value of the state proceeding is a direct function of the rigor and thoroughness of the procedures used by the state commission.

> The Commission… has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of the state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition.

Michigan Order ¶ 30. But only where "the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision."[23] While it is plain that the FCC has not and

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[23] Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, 15 FCC Rcd 18354, ¶ 51 (2000) ("Texas Order"); see also Speech of Chairman Reed E. Hundt at 5, "Access Reform and Universal Service: Into the Thick of It," before NARUC Communications Committee (Feb. 25, 1997) <http://www.fcc.gov./speeches /Hundt/speh708.html> ("A credible state fact-finding process, in which opponents have ample opportunity to challenge directly Bell company claims of network opening, will be useful to a Bell in carrying its burden of proof before the FCC on any disputed facts. The

need not prescribe specific procedural requirements for states to follow in their 271 proceedings, it is equally plain that the most credible, reasoned fact finding flows from full adjudicative-type proceedings. This would include, at a minimum, a right to discovery against other parties, a right to submit evidence and testimony, a right to cross-examine other parties' witnesses, and findings made on record evidence. See generally, Administrative Procedure Act, 5 U.S.C. §§ 554-555.

These procedures were not deployed adequately in Oklahoma or in Kansas. As discussed below, the states in fact initially set out to conduct extensive and multiple adjudicative proceedings, but these were not completed. Although SWBT elaborates for more than ten pages on the processes used in these states, its rendition omits key facts and fails overall to reveal the rush-to-judgment, quick-fix nature of the last few weeks of decision making that occurred in both states. Its discussion attempts to extend the successes of the comprehensive processes deployed in Texas to Oklahoma and Kansas, but that is simply counterfactual. In its Texas Order, the FCC reviewed the extensive work done in Texas, observing that "for more than two years, the Texas Commission has worked with SWBT and competing carriers to identify and resolve a number of key issues related to SWBT's compliance with the Act." Texas Order ¶ 3. No comparable efforts occurred in the instant states.

Kansas. The Kansas Corporation Commission held initial 271 hearings in 1998, resulting in a report that identified numerous deficiencies in SWBT's attempts to establish compliance with Section 271 requirements. Interim Report, *passim* (KCC Nov. 18, 1998) (App.

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quality of the record compiled by each state commission may be more important than the vote that commission casts.").

C, tab 158). The KCC further found little evidence of actual competition in the state.[24] That record sat dormant, and grew stale, over the next year and a half. It was not until Spring 2000, after SWBT's Texas application received state support and was pending at the FCC, that the Kansas process was restarted. Notwithstanding the long dormancy, in April 2000, SWBT began urgently pressuring the KCC to act on SWBT's freshly filed papers. The KCC acquiesced in this rush, opting to forego its normally rigorous standards and procedures and to utilize pre-filed, paper affidavits and testimony without the opportunity for cross-examination. Timelines were short: the KCC Staff filed its recommendations on August 21, 2000 -- only 3 weeks after the paper submissions had come to rest. See Staff Report at 3-4. Notwithstanding numerous parties' demonstrations of a broad range of factual issues that had been put in dispute,[25] the KCC chose not to use adjudicative procedures to resolve these controversies.

At hearings held in 1998, the KCC used procedures involving both the right to file testimony and the right to conduct cross-examination on the record. Since June 1998, witness testimony has not undergone the rigors of cross-examination. While SWBT and other parties have filed affidavits, standard adjudicative procedures -- procedures which were in fact used in earlier proceedings on the same issues -- have been unavailable.

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24 Id. at 4-5 (only four residential customers being served by a CLEC). The KCC observed as recently as January 2000 that competition remained nascent in Kansas. See Telecommunications Report to the Kansas Legislature at 25 (KCC Jan. 3, 2000) <http://www.kcc.state.ks.us/scan200001/20000105095717.pdf>.

25 See, e.g., AT&T's Comments Regarding KCC Staff Recommendations (KCC Aug. 31, 2000) (App. C, tab 274); MCI Comments Regarding Staff Recommendation (KCC Aug. 31, 2000) (App. C, tab 268); Birch's Comments Regarding Staff Recommendation (KCC Aug. 31, 2000) (App. C, tab 269).

Given this, the KCC Staff's attempt to resolve specific issues in dispute is not entitled to deference by the Commission.[26] The crush of work confronting the KCC and its staff inevitably led to numerous problems. As discussed in detail in later sections, the rush to decision precluded the establishment of lawful prices, and forced the KCC to defer wholesale to the Texas experience without serious analysis as to its applicability. The KCC Staff identified extensive problems with SWBT's OSS with respect to Kansas-specific data, but ultimately ignored these in making its recommendation. No Kansas-specific OSS testing has been done.

In addition, the short-circuited process allowed SWBT to hold hostage and refuse to make available any lawful version (at least as deemed by the KCC) of the K2A until mid-October, only *days* before SWBT filed for FCC approval. It seems hardly credible for SWBT to claim it has opened the Kansas markets if its principal basis for this claim did not even become legally available until last month.

Oklahoma. Similar shortcuts and problems have riddled the Oklahoma processes. After the OCC's first effort to grant SWBT's application was rejected by the FCC, the OCC commenced a proceeding to give comprehensive consideration to SWBT's anticipated efforts to provide interLATA services in 1997.[27] In early 1998, hearings commenced before an

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[26] In many instances, the Staff responsibly did not try to resolve the facts in dispute, but rather openly acknowledged the controversy, and deferred assessment until additional evidence might be submitted. Unfortunately, this needed assessment will not occur until *after* the proposed approval of the application. In other cases, the Staff simply judged that, assuming SWBT's failings had been proven, they were not to be given decisional weight. In either type of disposition, however, the FCC is fully able to make such assessments itself, *de novo,* without giving weight to the state staff finding (or any KCC submission based upon the Staff Report).

[27] As the Commission well knows, the OCC's initial effort at reviewing SWBT's 271 compliance expressly rejected the use of hearings of any sort and expressly identified the

Administrative Law Judge ("ALJ") with the opportunity to cross-examine witnesses. The proceeding was deemed to be a formal adjudication, along with conventional *ex parte* contact prohibitions. Based on the record developed in these proceedings, the ALJ found significant deficiencies in checklist compliance, and seven months later, the OCC adopted these findings. OCC Interim Order at 8-9 (OCC March 30, 1999) (App. C, tab 141) ("OCC Interim Order").

As an outgrowth of the OCC Interim Order, a number of proceedings and undertakings were deemed necessary prerequisites to ultimately demonstrating to the OCC that SWBT had come into Section 271 compliance. First, SWBT was required to bring itself into compliance with numerous checklist items, and submit evidence accordingly. As a means to this, and to ensuring against backsliding, the report also identified the need to both develop performance measurements and to require SWBT to report satisfactory results under these measurements to demonstrate SWBT compliance. Report and Recommendations of the Administrative Law Judge, Conclusions at 17 (OCC Jan. 28, 1999) (App. C, tab 130) (in future proceedings, SWBT "must prove that the procedures and/or actions outlined above, concerning the checklist items SWBT currently fails to meet, have been implemented and that performance measurements are in place to monitor SWBT's provisioning of these items") ("ALJ Report"). As a result of these findings, adopted by the OCC Interim Order,[28] the OCC Staff filed Cause No. PUD 99-131, in order to establish performance measurements, develop a process for reviewing compliance with

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state's role as a policy judgment. After the FCC was forced to turn away SWBT's first application for Oklahoma, the OCC decided to initiate more reliable procedures. Unfortunately, however, the decisions ultimately reached were not based upon those proceedings but rather last minute compromises and bootstraps.

[28] The docket was also an outgrowth of the work of a Telephone Advisory Group that had been directed by the Interim Order to address next steps.

those measures, and to adopt penalties for non-compliance.[29] The data gathered from the standards developed and applied in PUD 99-131 would be used for evaluation of Section 271 compliance. See generally, Birch Comments (OCC filed Aug. 17, 2000) (App. C, tab 201).

The Interim Order also adopted the ALJ's findings regarding the need to develop satisfactory evidence of other areas of SWBT's activities, specifically, the need for SWBT to file and justify collocation rates that are cost-based. ALJ Report, Conclusions at 4. SWBT apparently sat on this mandate, ignoring its legal obligations until earlier this year. The OCC was forced to issue another order to require SWBT to file a tariff for collocation terms and conditions.[30]

In addition, the OCC Interim Order contemplated that evidentiary hearings would subsequently be held not only on the checklist items for which SWBT has failed to show compliance, but also on those items for which compliance had previously been shown but which may have thereafter undergone some change. OCC Interim Order at 9 (SWBT will need to certify continued compliance on these issues and interested parties will be permitted to submit evidence rebutting these assertions). Especially in light of the OCC's recognition that SWBT's compliance had been tested in the hearing based on old law, that is, prior to the Supreme Court's overhaul of the Eighth Circuit, Iowa Utilities Board v. FCC, 525 U.S. 366 (1999) reversing 120

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29 See Amended Application filed by Director of the Public Utility Division, Cause No. PUD 99-131 (OCC March 10, 2000).

30 See generally, Application of CCCOK, Inc., d/b/a Connect!, DSLNet Communications, LLC, KMC Telecom III, Inc. and New Edge Network, Inc. for an Order Requiring SWBT to File a Collocation Tariff, Dkt. No. 200000169, Order Denying Appeals from the April 20, 2000 Oral Recommendation of the Administrative Law Judge at 3 (OCC May 2, 2000) ("OCC Collocation Order").

F.3d 753 (8th Cir. 1997), and the fact that "the record in this Cause is somewhat stale" even by March 1999, OCC Interim Order at 9, it was clear to all interested parties that substantial efforts would still have to be undertaken before SWBT could credibly demonstrate full Section 271 compliance through on the record proceedings.

But all of these plans and scheduled proceedings were thrown aside in the second half of this year, and replaced with expedient and unreliable substitutes. On June 9, 2000, SWBT moved not simply to reopen the 271 docket but to revamp entirely the procedures laid out in the Interim Order and all associated proceedings. By that motion, SWBT sought to have the OCC review its draft application, review and approve the O2A, adopt wholesale the Texas OSS findings, adopt the Texas performance measurements, ignore or summarily resolve a variety of rates and charges associated with 271 compliance, and adopt the Texas Performance Remedy Plan, including assessment of the adequacy of the Texas penalties as applied to Oklahoma, all within a wholly unrealistic time frame. The motion drew strong objections from all interested parties, including the State Attorney General and initially OCC Staff, and it was denied by the ALJ on June 15, 2000 as premature and inconsistent with prior procedures established by the OCC.[31] Nonetheless, SWBT eventually received the schedule it wanted, which required parties

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[31] SWBT, Commissioners' aides and OCC Staff, and members of the OCC Office of General Counsel apparently met *ex parte* on June 20, the day before SWBT was to argue its appeals to the Commission en banc from the ALJ's recommendation to deny SWBT's motion. See Transcript of Hearing at 23-28 (OCC Sept. 22, 2000) (Statement of Ms. Coleman, Office of the Oklahoma Attorney General). The State Attorney General and others strenuously objected to this meeting as unlawful *ex parte* contacts. Id.; see also Sprint's Motion to Declare Order Nunc Pro Tunc as Void and Motion for Reconsideration at 6-19 (OCC Oct. 9, 2000). After that meeting, Staff changed its position from firm opposition to the motions to supporting them, including the SWBT request to have a final order by September 30, 2000.

to file initial testimony and comments by August 17 on all issues, and secured a commitment from the OCC to issue a final order by the end of September.[32]

The procedural choices reflected in the OCC's last-minute rescheduling inevitably resulted in significant substantive errors, and eliminated any opportunity for the FCC to benefit from fact finding at the state level. Like Kansas, the rush to meet an arbitrarily short deadline prompted the OCC to adopt the results of Texas' comprehensive efforts without adequate review of their applicability to Oklahoma. Pricing decisions that had been on track were short-circuited in order to satisfy the Section 271 window; both the timing and the results of proceedings to establish lawful permanent rates remains in serious doubt. Like the Kansas K2A, the O2A has

[32] This not only represented a wholesale abandonment of the procedures and schedules that had been put into place two years prior, it left interested parties, Staff and ultimately the OCC itself an exceptionally short time frame in which to adduce and evaluate an evidentiary record on the issues. Moreover, because SWBT announced that it was withdrawing its motion to consolidate remaining performance measurements issues from PUD 99-131 into this docket, the parties were left without any notice that the OCC would in fact address these issues in the section 271 proceeding. Sprint, Birch, and Cox raised this failure to give notice and lack of due process regarding performance measurements issues numerous times, including the first day of the hearing. See, e.g., Comments of Sprint (OCC Aug. 17, 2000); Rebuttal Comments of Sprint (OCC Aug. 31, 2000); Objection of Sprint to Evidence Relating to Performance Measurements Issues (OCC Sept. 15, 2000). In spite of the failure to clearly indicate that these issues would be considered, the proceeding went to hearing in September 18 through September 22 (at which time the OCC allowed testimony on all issues, including performance measurement issues); a written order issued 6 days later on September 28. See Order Regarding Recommendation on 271 Application Pursuant to Telecommunications Act of 1996 (OCC Sept. 28, 2000) (App. C, tab 275). On October 4, 2000, the OCC issued Order Nunc No. 445340 correcting "mistakes" in the September 28 Order. Order Nunc Pro Tunc Regarding Order No. 445180 (OCC Oct. 4, 2000) (App. C, tab 276). Even the Nunc Pro Tunc Order was controversial, and accordingly protested by both the State Attorney General and private parties, including Sprint. See, e.g., Attorney General's Motion to Set Aside Order No. 445340 As Void (OCC Oct. 16, 2000) (App. C, tab 281); Sprint's Motion to Declare Order Nunc Pro Tunc as Void and Motion to Reconsider (OCC Oct. 9, 2000) (App. C, tab 278); AT&T's Motion to Reconsider Order No. 445340 (OCC Oct. 16, 2000) (App. C, tab 282).

not been available to CLECs in Oklahoma throughout the state review process; it did not become even theoretically available to CLECs until October 9, 2000, at the earliest, and the OCC did not rule on its current form with specific revisions until October 20, 2000 -- six days before SWBT filed with the FCC. Indeed, the OCC acquiesced in SWBT's absolute insistence that CLEC access to the terms of the O2A would remain hostage until the OCC recommended 271 approval.[33] Plainly, no competitive entry could have been enabled by the O2A at any time relevant to this proceeding.

Both the Oklahoma and the Kansas Commissions were fully aware of the need for comprehensive adjudication in their respective Section 271 proceedings. In fact, prior to the full court press generated by SWBT upon the approval of its Texas application, each agency had set out plans to conduct orderly, on the record hearings to resolve the many factual issues inherent in Section 271 review. But both Commissions ultimately abandoned those schedules and procedures; their conclusions should be accorded weight commensurate with the procedures used to reach those conclusions.

IV. SWBT FAILS TO COMPLY WITH SECTION 271's COMPETITIVE CHECKLIST.

Section 271 requires SWBT to provide access to unbundled network elements ("UNEs") and interconnection in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). 47 U.S.C. § 271(c)(2)(B)(i), (ii). Sections 251(c)(3) and 252(d)(1) in turn require that SWBT provide interconnection and unbundled access to UNEs at cost-based rates and on terms and

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[33] See Southwestern Bell Telephone Company's Notice of Intent to File with the FCC at 6, (OCC June 9, 2000) (OCC App. C, tab 142) ("Thus, the O2A, by its terms, is not available to CLECs until this Commission issues an order approving the Agreement as meeting the fourteen point checklist in Section 271 of the FTA").

conditions that are just, reasonable, and nondiscriminatory. Id. §§ 251(c)(3), 252(d)(1). This obligation (as well as other checklist requirements such as those covering resale and specific UNEs) includes the requirement that a BOC provide nondiscriminatory access to its operations support systems, or OSS.[34] As discussed below, SWBT fails this checklist item for several reasons. First, SWBT fails to provide access to UNEs at cost-based rates. Second, SWBT fails to provide nondiscriminatory access to its OSS. Third, Sprint's own experience shows additional specific problems with DSL-capable loops as well as collocation.

A. SWBT Does Not Provide Unbundled Network Elements Or Interconnection At Rates That Are Reasonable Or Cost-Based, In Violation Of Section 271 Of The Act.

In carrying out its responsibilities to administer Section 271, "the Commission has determined that prices for interconnection and unbundled network elements (or UNEs) must be based on an incumbent LEC's forward-looking, long-run incremental costs for each network element." New York Order ¶ 237.[35] As recognized in the Michigan Order, "[t]he Act vests in the Commission the *exclusive responsibility* for determining whether a BOC has priced . . . unbundled network elements . . . in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist." Michigan Order ¶ 282 (emphasis added). The question of whether current and future prices for interconnection and UNEs would permit efficient entry or effective competition is critical in

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34 Applications by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953, ¶ 84 (1999) ("New York Order"), aff'd, AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000).

35 Iowa Utils. Bd. v. FCC, No. 96-3321, Mot. for Partial Stay of Mandate (8th Cir. Sept. 22, 2000) (staying effect of ruling vacating Commission's TELRIC pricing rules).

determining compliance with Section 271's checklist. See, e.g., South Carolina Order ¶ 36. As discussed below, SWBT does not offer access to UNEs or interconnection at cost-based rates in Kansas or Oklahoma. Given this deficiency, it cannot be surprising that local competition cannot be found in these states today.

1. SWBT's application is replete with interim prices for UNEs and interconnection that chill competitive entry in both Kansas and Oklahoma.

The FCC has indicated that the issue of whether interim rates are acceptable in a BOC's Section 271 application should be addressed on a case-by-case basis. New York Order ¶ 258. The Commission has recognized that "interim rates create uncertainty," but that they may be tolerable "at least for the time being" where that uncertainty is demonstrably minimized. See id. In Texas, the Commission articulated a three prong test to determine whether it is acceptable to have interim rates as part of a Section 271 application, noting that where "an interim solution to a particular rate dispute is [1] reasonable under the circumstances, [2] the state commission has demonstrated its commitment to [the FCC's] pricing rules, and [3] provision is made for refund or true-ups once permanent rates are set," interim rates may be acceptable. Texas Order ¶¶ 88, 241; see also New York Order ¶ 258. SWBT's application does not meet this standard for either Kansas or Oklahoma.

a. SWBT's interim rates are not reasonable.

In its recent evaluation of Verizon's 271 filing in Massachusetts, the Justice Department indicated that there was reason to suspect that Verizon's UNE rates were not cost-based due to the "*disparity between the prices of UNEs in Massachusetts and the prices of those same* *elements in other [Verizon] states*."[36] Although the Department acknowledged that some differences would no doubt occur from state-to-state (since each state commission sets prices independently), the Department could not identify any "*obvious reason for the magnitude of the disparity between Massachusetts and other states in the Verizon region*." DOJ Massachusetts Eval. at 19 & n.67.[37]

The disparities between prices in Kansas and Oklahoma on the one hand and Texas on the other similarly suggest that the former are neither cost-based nor reasonable. For example, when SWBT's interim non-recurring cost ("NRC") charges for UNEs in Kansas are compared to Texas NRC charges for the same elements, inexplicable disparities become apparent.[38] As the

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36 Application by Verizon New England for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Dkt. No. 00-176, DOJ Evaluation at 19 & n.67 (filed Oct. 27, 2000) ("DOJ Massachusetts Eval.") (emphasis added).

37 The Commission has recognized that in some instances costs, and thus prices, may vary from state to state "due to differences in terrain, population density, and labor costs." Michigan Order ¶ 291. As noted below, it does not appear that any of these factors explains the magnitude of the differences between SWBT's rates in Kansas and Oklahoma as compared to Texas.

38 On November 3, 2000, subsequent to the date of SWBT's application, the KCC issued an order adopting permanent rates for UNE NRC charges. See Application of Sprint Communications Company L.P. for the Commission to Open a Generic Proceeding on SWBT's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale, Dkt. No. 97-SCCC-149-GIT, Order Regarding Non-Recurring Charges for Unbundled Network Elements (KCC Nov. 3, 2000). Regardless, SWBT's application fails to present a *prima facia* case that its interim UNE NRC charges are reasonable and further violates the Commission's "complete when filed" rule. See, e.g., Michigan Order ¶¶ 49-54; South Carolina Order ¶ 38. In any event, even if the Commission were to consider those rates, they are unreasonable. (For example, the Kansas permanent NRC charges for 4W analog loops (zones 1-3) are over six times those in Texas. Similarly, permanent rates for 2W digital loops are 4.8 times higher than in Texas.)

chart below demonstrates, Kansas NRC charges for UNEs greatly exceed comparable NRC charges for Texas:

UNE	Texas NRC First[39]	Kansas NRC First	% Kansas Rate v. Texas Rate[40]	Texas NRC Additional[41]	Kansas NRC Additional	% Kansas Rate v. Texas Rate
2W Analog Loop (zones 1-3)	$15.03	$60.55	**303%**	$6.22	$25.30	**307%**
2W Digital Loop (zones 1-3)	$15.03	$157.20	**946%**	$6.22	$82.00	**1218%**
4W Analog Loop (zones 1-3)	$15.03	$60.55	**303%**	$6.22	$25.30	**307%**
Cross Connect, Analog Loop to Collo 2W (same CO)	$4.72	$35.83	**659%**	$4.72	$29.44	**524%**
Cross Connect, Digital Loop to Collo 2W (same CO)	$4.72	$19.96	**323%**	$4.72	$12.69	**169%**

SWBT's interim rates for UNE NRC charges in Oklahoma, as demonstrated by the examples below, are similarly troubling, again due to the enormous disparity between the Oklahoma and Texas rates:

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39 "NRC First" denotes the first UNE on a service order.

40 This column reports what percentage the Kansas rate is of the Texas rate, and is computed by subtracting the Texas rate from the Kansas rate, dividing by the Texas rate, and multiplying by 100 to state a percentage. For example, where the Texas rate is $15 and the Kansas rate is $30, this column would report that the Kansas rate is 100% higher than the comparable Texas rate (($30-$15)/$15 x 100%). This example alternately could be described as the Kansas element costing twice as much as the identical Texas element. The same calculation is reported for the Oklahoma chart, with Oklahoma rates simply substituting for Kansas rates in the equation.

41 "NRC Additional" denotes additional elements on the same service order.

UNE	Texas NRC First	Oklahoma NRC First	% Oklahoma Rate v. Texas Rate	Texas NRC Additional	Oklahoma NRC Additional	% Oklahoma Rate v. Texas Rate
Cross Connect, Analog or Digital Loop to DCS 2W	$20.65	$121.97	**491%**	$16.50	$93.63	**467%**
Cross Connect, Analog Loop to DCS 4W	$20.65	$127.93	**520%**	$16.50	$99.59	**504%**
Cross Connect, Digital Loop to DCS 4W	$28.95	$144.60	**399%**	$26.47	$117.45	**344%**
Cross Connect, Analog or Digital Loop to Collo/MUX 2W	$19.32	$62.04	**221%**	$19.00	$48.22	**154%**
Cross Connect, Digital Loop to Collo/MUX 4W	$22.03	$101.70	**362%**	$19.28	$67.27	**249%**

SBC has offered no explanation to the FCC why the NRC charge for installation of an unbundled 2-wire digital loop in Kansas should cost over 10 times what CLECs pay for installation of the same loop in Texas. SBC offers no explanation why the NRC charge for installation of an identical loop in Oklahoma would cost over 6 times what it costs in Texas. Moreover, because NRC charges are the same for SWBT's rural zone (zone 1) as for its urban zone (zone 3) in both Kansas and Oklahoma, it does not appear that the usual reasons identified for disparities, such as terrain or population density, would account for the magnitude of difference in the rates. Nor does labor appear to be the determinative factor. SWBT's Texas rates per half hour for basic time ($42.88), overtime ($56.02), and premium time ($69.18) exceed Kansas for each category ($28.95, $26.97, $32.29, respectively).[42] While SWBT's Oklahoma

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[42] Compare K2A, Appendix Pricing - UNE, Schedule of Prices at 10 (Oct. 9, 2000) (App. C, tab 300) ("K2A") (Time and Material Charges for Basic Time, Overtime, Premium Time - per half hour; NRC First column), with T2A, Appendix Pricing - UNE, Schedule of Prices at 12 (TPUC Jan. 7, 2000) (App. B, tab 68) ("T2A") (Time and Material Charges for Basic Time, Overtime, Premium Time - per quarter hour; NRC First column;

rates range from 8-15% higher for labor in each of these categories ($49.48, $62.10, $74.73, respectively),[43] such a disparity cannot possibly account for the fact that Oklahoma NRC charges are 150-520% higher than Texas NRC charges for the same element.[44]

With regard to loop conditioning charges, CLEC advanced services that use conditioned xDSL lines, such as Sprint ION, are particularly sensitive to non-cost-based loop conditioning rates. As a result, Sprint -- whose local exchange carriers know precisely what activities and costs are involved in removing load coils, repeaters, and bridged taps -- has undertaken an extensive effort to educate state commissions on the propriety (or, in this case, impropriety) of SWBT's proposed charges.[45] Unfortunately, the OCC's and KCC's last minute attempts to

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figures are doubled to get rates per half hour). These rates are for the first UNE or service on an order; the labor NRC charges for additional UNEs or services on the same order are even lower. Id. (NRC Additional column).

43 Compare O2A, Appendix Pricing - UNE, Schedule of Prices at 12 (OCC Oct. 24, 2000) (App. C, tab 287) ("O2A") (Time and Material Charges for Basic Time, Overtime, Premium Time - per half hour; NRC First column), with T2A, Appendix Pricing - UNE, Schedule of Prices at 12 (Time and Material Charges for Basic Time, Overtime, Premium Time - per quarter hour; NRC First column; figures are doubled to get rates per half hour). As with Kansas, these rates are for the first UNE or service on an order; again, the labor NRC charges for additional UNEs or services on the same order are even lower. Id. (NRC Additional column).

44 SWBT affiant James L. Jones indicated that in December 1999 the OCC "discounted the nonrecurring charges for many frequently used UNEs as much as 35 percent. These discounts are to remain in effect up to 5 years for the provisioning of residential services and up to 4 or 5 years for the provisioning of business services (depending on the Zone) or until significant residential and business line counts are achieved by SWBT's competitors." SWBT Br., Jones Aff. ¶ 38. If the above rates reflect discounts, then the comparison to Texas is even further understated.

45 See, e.g., Sprint's Comments Regarding SWBT's NRC Studies at 3-5, Application of Sprint Communications Company L.P. for the Commission to Open a Generic Proceeding on SWBT's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale, Dkt. No. 97-SCCC-149-GIT (KCC filed Dec. 17, 1999);

temporarily dispose of the issue of loop conditioning rates pending the Commission's review of these applications by setting the charges at zero does little to relieve CLEC uncertainty.[46] While a zero rate is far more reasonable than the interim rate proposed by SWBT, it presents CLECs with a dilemma. On the one hand, CLECs are faced with SWBT's proposed loop conditioning charges ranging from $392.88 to $1079.21. See, e.g., WorldCom Comments at 55 (OCC Aug. 17, 2000) (App. C, tab 187).[47] On the other hand are interim rates of zero, subject to a true-up. To the extent that competitors reasonably believe that the KCC and OCC are more likely than not to adopt rates far above costs at levels approximating SWBT's proposed rates, the use of interim rates cannot dispel the uncertainty and risk of entry. If the rates are set at SWBT's

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Rebuttal Testimony of Carl H. Laemmli *passim*, Petition of Sprint Communications Company L.P. for Arbitration of Unresolved Interconnection Issues Regarding xDSL with SWBT, Dkt. No. 99-SCCC-701-ARB (KCC filed Aug. 17, 1999).

46 The Commission was not sympathetic to similar claims in the Texas Order. See Texas Order ¶ 237 ("carriers face uncertainty about the imposition of a true-up only to the extent that they reasonably believe that they may in fact have a legal obligation to pay something greater than a charge of zero"). Sprint respectfully disagrees, and points out that, given the history of the Commission's TELRIC rules, it is difficult to know what constitutes a "reasonable belief" when it comes to pricing. In any event, although Sprint believes that SWBT may incur costs for loop conditioning above zero for some loops, Sprint believes that in those instances, the actual costs incurred are a tiny fraction of SWBT's proposed rates. As discussed below, however, it is not clear that the KCC or the OCC will hold SWBT's proverbial "feet to the fire" to ensure that loop conditioning charges are cost-based.

47 In fact, SWBT's position on what rate applies is not clear. In his affidavit, Mr. James L. Jones indicates that SWBT's "proposed rates and charges [as provided in Jones Schedule V] for these new elements [subloop elements and digital subscriber loop conditioning] will be considered interim until the [OCC] has conducted a review and released an order addressing the appropriateness of the proposed rate levels." SWBT Br., Jones Aff. ¶ 41. Yet Schedule V reports loop conditioning charges that range from $304.86 for removal of a bridged tap to $1,690.20 for removal of a bridge tap and load coil. Id., Schedule V at 2. This is in contrast to SWBT's O2A xDSL attachment 25, which lists these rates as zero. O2A, Attachment 25 - xDSL at 11.

proposed rates, then CLECs that have rolled out xDSL will face true-ups of thousands of dollars per loop five months from now.[48] Such uncertainty often forces CLECs to delay or limit their entry. In the meantime, because any underpayments by SWBT's advanced services affiliate simply amount to paper transfers, SWBT is not harmed by the uncertainty surrounding loop conditioning rates. Not surprisingly, SWBT, under the auspices of its "Project Pronto,"[49] is rapidly outpacing CLECs in xDSL deployment.

The Commission has previously indicated that "[u]nreasonably high non-recurring charges for unbundled loops and other essential inputs can have as much of a chilling effect on local competition as unreasonably high recurring fees." Michigan Order ¶ 296. By proposing unreasonably high NRC charges for UNEs and loop conditioning in the K2A and O2A, SWBT has chilled local and advanced services competition in both those states.

b. The KCC and OCC have not made reasonable efforts to comply with the Commission's pricing rules.

Nor can the Commission rely on the KCC's and OCC's commitment to set TELRIC-based rates. Where, as here, neither state has made consistent efforts to set interim rates in compliance with the Commission's rules, the Commission cannot depend upon them to start doing so now. As discussed in Section III, *supra*, both the KCC and OCC have essentially

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48 Even if the state commissions reduce SWBT's proposed rates by 50%, its loop conditioning charges will still range from $196.44 to $539.61 for removal of a single impediment on a single loop.

49 See SBC News Center, "SBC Reports Third-Quarter Earnings" at 1 (Oct. 23, 2000) (reporting that SWBT has "516,000 Digital Subscriber Line (DSL) customers at the end of the quarter, with a current run rate of more than 4,000 net adds a day"); see also Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 20912, ¶ 3 n.6 (1999) ("Line Sharing Order").

acquiesced in SWBT's desires regarding the timing and outcome of their Section 271 dockets. With the "carrot" of 271 gone, there is every reason to believe that these commissions will have even less leverage over SWBT.

The record to date is not encouraging. For example, both the KCC and OCC have waited *years* to set cost-based collocation rates. Despite the fact that the FCC declared almost three years ago in the South Carolina Order that BellSouth's collocation rates were deficient because they reflected charges that were subject to negotiation on an individual case basis ("ICB"),[50] neither state commission acted to ensure that SWBT would replace its ICB pricing with standard collocation rates until earlier this year.[51] In April, responding in part to competitors' complaints that SWBT's existing ICB prices were "higher than in most states, [and] twice or three times as high as in many other states," the KCC adopted SWBT's proposed rates as interim rates, with two modifications, subject to true up.[52] KCC Collocation Order ¶¶ 8, 17.

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[50] See South Carolina Order ¶ 204 (BellSouth's failure to include specific rates for space preparation fees in its SGAT "undermin[ed] the premise of an SGAT, which is to contain sufficiently specific terms and conditions such that checklist items are generally offered and available to all interested carriers at concrete terms, rather than left largely to future negotiation.").

[51] See Application of SWBT Filing Tariff Revisions to Establish a New Local Access Services Tariff for Physical Collocation Arrangements Furnished or Made by SWBT in the State of Kansas, Dkt. No. 00-SWBT-733-TAR, Order Granting in Part, Denying in Part Motion to Integrate Texas Collocation Rates into the SWBT-Kansas Collocation Tariff, Pending a Kansas-Specific Cost Proceeding and Subject to True Up ¶ 8 (KCC Apr. 21, 2000) ("KCC Collocation Order"); OCC Collocation Order at 3.

[52] Staff recommended that the KCC reduce SWBT's rates for site conditioning and power by 50% due to the fact that "SWBT's proposed rates are very much higher than the Texas interim rates for Power." KCC Collocation Order ¶ 11. For example, SWBT's proposed monthly recurring rate for DC power consumption for caged collocation was $3,026.96 in Kansas, compared to a Texas interim rate of $1,049.57. Id., Attachment 2. Similarly, SWBT's proposed non-recurring rate for cageless site conditioning was $601.34 per 18

As described in Section III, *supra*, the Oklahoma history is equally disconcerting. The OCC recognized in 1998 that SWBT's ICB charges were unlawful, but it simply failed to ensure that SWBT file tariffed collocation rates until SWBT pressed it to hurry through the 271 review. Notwithstanding nearly two years' opportunity to develop permanent rates, and notwithstanding complaints that SWBT's ICB rates were "among the highest in the nation," the OCC simply adopted the Texas collocation rates as interim rates for Oklahoma. OCC Collocation Order at 3-4, 10. To its credit, in its final order approving SWBT's 271 application, the OCC further refined the true-up due to concern "that an interim rate which is subject to true-up has the potential for impairing the business plans of a CLEC that desires to enter the local exchange market, due to the uncertainty of the costs they must use to make investment decisions." OCC Final Order at 164. The OCC attempted to ameliorate this fundamental problem by requiring "that any true-up requirements for an interim rate shall not exceed a 6 month period of time beyond the date of this Order." Id. at 165.

Clearly, the KCC and OCC have "had sufficient time to complete [permanent rate] proceedings" for collocation. Cf. New York Order ¶ 260. Nor is this rate dispute "new," as the Commission found to be the case in Texas. Texas Order ¶¶ 86, 239. Their failure to set rates for such a basic entry input -- when they have known for almost three years that ICB rates for collocation are unacceptable -- is directly relevant to whether the Commission can discount the uncertainty and risk of non-cost-based interim rates. New York Order ¶ 260 (noting that the

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sq. ft. in Kansas, compared to an interim charge of $0 in Texas. Id. The adopted reductions recommended by Staff reduced the interim charges to $1,513.48 and $300.67, respectively. Id.

Commission will "become more reluctant to continue approving section 271 applications containing interim rates").[53]

The Commission has also clarified that permanent rates are a far sounder basis upon which to evaluate a Section 271 application: "It would not be sound policy for interim rates to become a substitute for completing these significant [permanent rate] proceedings." Id. Despite these admonitions, SWBT has submitted the K2A, which contains over 190 recurring and NRC rates identified as interim, but not subject to further proceedings. See K2A, Attachment 6, Appendix Pricing - UNE, Schedule of Prices at 13-14. As SWBT's footnotes to the K2A reveal, prices labeled with a "(4)," including prices for certain recurring and non-recurring cross connect rates for loops and dedicated transport and recurring charges for STP access connections and links for unbundled signaling, are interim prices "not pending review by the KCC at this time." Id. at 1, 9, 13. Prices labeled with a "(6)," including recurring and non-recurring prices for certain loop cross connects, subloop feeder rates for dark fiber, and interoffice transport rates, are interim prices set in the T2A that are "not [being] addressed in any Kansas interconnection agreement or proceedings." Id. at 14. Similarly, in his direct testimony before the OCC, SWBT witness James L. Jones admitted that the T2A contained interim prices from the T2A that are currently not subject to regulatory review in any OCC docket. See OCC Final Order at 63 ("These elements will be made available to a CLEC at the Texas prices on an interim basis, subject to a CLEC requesting review of Oklahoma-specific cost studies by the OCC").

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[53] Moreover, both the K2A and O2A contain ICB rates for certain UNEs and charges associated with UNEs, including dedicated transport, unbundled signalling and dark fiber (interoffice).

c. True-ups do not sufficiently remedy the uncertainty faced by CLECs in Kansas and Oklahoma.

SWBT's interim rates are generally subject to true-ups, with some limitations. For example, the OCC has limited SWBT's ability to collect true-ups for certain rates, ostensibly in an effort to incent SWBT to quickly file cost studies for certain rates.[54] However, where, as here, SWBT's interim rates often exceed its costs, the OCC's restriction on true-ups, far from creating an incentive, acts as a *disincentive* to SWBT filing permanent rates. Regardless, as discussed earlier, the presence of true-ups in this case does little to relieve CLEC uncertainty where the potential for exorbitant permanent rates is very real. Finally, in Kansas, the KCC has made no effort to reduce this certainty by placing a time limit on true-ups, in contrast to the OCC's six-month limitations. The openendedness of true-ups creates a potential financial contingency that many CLECs cannot withstand.

2. Oklahoma's Permanent Charges for UNEs Are Not Cost-Based.

As noted, Section 271 requires the Commission to ensure that prices for UNEs be based on forward-looking, economic costs. New York Order ¶ 237. Setting prices for UNEs at cost will best replicate the conditions of a competitive market and encourage efficient market entry.[55] The Commission has made clear that it will reject a BOC's 271 application "if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters

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[54] See, e.g., OCC Final Order at 164-65 (limiting true-up requirements for physical and virtual collocation "in order to encourage [SWBT] to expeditiously seek a permanent rate"); id. at 166 (same with respect NRCs for pre-existing UNE-platform combinations); id. at 182 (same for interim rates for line sharing and line splitting).

[55] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 679 (1996) ("Local Competition Order"); see also Michigan Order ¶ 289.

so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." New York Order ¶ 244. Oklahoma's UNE recurring and NRC rates -- the product of a stipulation between Cox, SWBT, and the OCC staff -- fail to comply with the Commission's TELRIC pricing methodology.[56]

In July 1998, following the recommendation of the ALJ, the OCC approved "permanent" rates for UNEs. OCC Pricing Order ¶ 1. In so ruling, the OCC concluded that "the[se] rates . . . should be deemed temporary, in that they will only apply for the remaining duration of any interconnection agreement, previously approved by this Commission." Id.[57] In addition, CLECs that had previously negotiated, or were at that time in the process of negotiating, an interconnection agreement with SWBT could incorporate the rates into their agreement pursuant to Section 252(i). Id. Further, for all future interconnection negotiations, the OCC indicated that "[t]he general principles of the federal Telecommunications Act of 1996 . . . will apply . . . at which time under Sec. 251, supra, the parties are free to reach the same or different negotiated terms." Id. These stipulated rates constitute the "permanent" UNE rates upon which SWBT relies on for approval of its Oklahoma application. SWBT Br., Jones Aff. ¶¶ 35-37; see also OCC Final Order at 151 (confirming that "these rates are the ones reflected in the O2A").

Despite the fact that the OCC Staff had identified numerous deficiencies with the cost inputs proposed by the parties, and in particular, with SWBT's cost studies (which in some

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[56] Application of Cox Oklahoma Telcom, Inc. for a Determination of the Costs of, and Permanent Rates for, the Unbundled Network Elements of SWBT, Cause Nos. PUD 97-213, PUD 97-442, Final Order ¶ 1 (OCC July 17, 1998) (Order No. 424864) (App. G, tab 17) ("OCC Pricing Order").

[57] Although deemed temporary, the rates were not subject to true-up. OCC Pricing Order ¶ 1.

instances were based on market, rather than cost, pricing), the ALJ nonetheless recommended that the OCC approve the rates stipulated to by Cox and the Staff, "which SWBT agreed not to oppose if adopted *in toto*."[58]

The ALJ repeatedly supported the stipulated rates with the rationale that "in total [they] fall well within the ranges of the various proposals; at times below what SWBT might have proposed yet above what AT&T might have proposed." See ALJ Recommendation at 158-159; see also id. at 165 (transport rates between AT&T's proposed rate, which is "at best, . . . the lowest possible cost and rate," and SWBT's proposed rate, which is "the opposite extreme"); id. at 162 (stipulated loop "costs are probably higher than AT&T has proposed" but "probably not as high as the costs SWBT proposed"); id. at 163 (rates for local switching set between AT&T's rate, which "is at best the minimum cost" and SWBT's rates, which "is at the upper limit of cost"); id. at 166 ("NRCs in the stipulation are 33 percent less than SWBT's proposed rates."). As a result, the stipulated prices were approved, even though the ALJ recognized that they did "not strictly equal any cost proposal of any party." ALJ Recommendation at 158-159.

In so ruling, the ALJ rejected AT&T's argument that, to be cost-based, rates must be determined mathematically, based on either a party's cost study or adjustments to that study. Id. at 159. Instead, the ALJ likened the OCC process to that of a jury in a civil case, and concluded that the OCC "has the discretion to adopt a position in the 'middle' of that which is proposed by the parties." Id. Moreover, the ALJ reasoned, the OCC "has no less freedom [than a jury] and

[58] Application of Cox Oklahoma Telcom, Inc. for a Determination of the Costs of, and Permanent Rates for, the Unbundled Network Elements of SWBT, Cause Nos. PUD 97-213, PUD 97-442, Amended Report and Recommendation of the ALJ at 156 (OCC June 30, 1998) ("ALJ Recommendation") (discussing problems with SWBT's cost studies); id. at 157 (adopting stipulated rates).

has never before restricted itself to such a simplistic approach in rate setting and the ALJ conclude[d] that it should not do so now." Id. Thus, the ALJ approved the stipulated rates, which Staff's counsel indicated at the hearing had been "calculated by taking the midpoint between the proposed recurring AT&T rates and the proposed recurring SWBT rates for all rate elements except the loop rate." AT&T Comments Regarding SWBT's Proposed "Oklahoma 271 Agreement" at 13 (OCC Aug. 17, 2000) (App. C, tab 195). Similarly, rates for UNE NRC charges, rather than being cost-based, "were calculated by taking two-thirds of the proposed SWBT non-recurring rates." Id. at 13 n.6; see also ALJ Recommendation at 6 (stipulated rates for recurring charges "generally represent the midpoint between the rates proposed by AT&T and the rates proposed by SWBT. With regard to non-recurring rates, the proposed settlements rates were arrived at by taking two-thirds of the rates proposed by SWBT.") (summary of cross-examination of SWBT witness Auinbauh). The ALJ's reasoning stands in stark contrast to the Commission's methodical approach to TELRIC pricing, as outlined in the Local Competition Order.[59]

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[59] Local Competition Order ¶ 699. Furthermore, the ALJ reasoned in support of its decision that "the use of the 'reasonable profit' term, as part of the [Act's] rate objective, also reinforces that the 'just and reasonable' rate need not be equal to any specific cost results in all cases." ALJ Recommendation at 158. However, as the Commission concluded in the Local Competition Order, the "concept of normal profit is embodied in forward-looking costs because the forward-looking cost of capital, *i.e.*, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements." Local Competition Order ¶ 700. By allowing SWBT to earn a "reasonable profit" above and beyond that already incorporated into TELRIC rates (which these are not), the OCC improperly added "an additional measure of profit to the risk-adjusted cost of capital," in violation of the Commission's prohibition against such supranormal profit. Id.

On July 17, 1998, the OCC adopted the substance of the ALJ's recommendation.[60] As Commissioner Bob Anthony indicated in his dissent to that order:

> [T]he stipulated rates adopted by this order were determined arbitrarily, and the record should be *reopened for a line by line and item by item determination of rates which satisfy the costing standards contained in Section 252* of the federal Telecommunications Act of 1996. *Instead of rates based on cost, today's order has adopted "settlement process" rates*.[61]

Nor can SWBT claim that the OCC's process led to rates that fall within the "range that the reasonable application of TELRIC principles would produce." See New York Order ¶ 244. In fact, Oklahoma's recurring and non-recurring rates for UNEs fall well outside any reasonable range. For example, Oklahoma's recurring rates for 4-wire analog and digital loops range from roughly 1½ to over two times greater than the same loop recurring rates in Texas.[62] Oklahoma's rates for common transport, both for termination MOU and facility miles MOU (zones 1-3) also

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60 Although the OCC indicated that "[t]he parties agreed that the LRIC studies performed by SWBT were the functional equivalent of TELRIC studies," it is not clear to which "parties" the OCC is referring. See OCC Pricing Order ¶ 3. It would appear that the OCC meant the "parties" to the stipulation, as AT&T and others clearly challenged the stipulated rates on the basis that they were not cost-based and thus did not comply with TELRIC.

61 OCC Pricing Order at 6 (dissent in part by Commissioner Bob Anthony) (emphasis added).

62 Compare O2A, Appendix Pricing - UNE, Schedule of Prices at 1 (unbundled loops 4W analog and 4W digital, zones 1-3), with T2A, Appendix Pricing - UNE, Schedule of Prices at 1 (same).

grossly exceed Texas rates -- ranging from two to 15 times higher than corresponding charges in Texas.[63]

Similarly, SWBT's permanent non-recurring rates in Oklahoma are not based on cost. As demonstrated, those rates far exceed analogous rates in Texas, the latter of which the Commission found to be reasonable and cost-based in the Texas Order:

UNE	Texas NRC First	Oklahoma NRC First	% Oklahoma Rate v. Texas Rate	Texas NRC Additional	Oklahoma NRC Additional	% Oklahoma Rate v. Texas Rate
2W and 4W Analog Loop (zones 1-3)	$15.03	$37.50	**150%**	$6.22	$15.65	**152%**
2W Digital Loop (zones 1-3)	$15.03	$93.24	**520%**	$6.22	$48.88	**686%**
4W Digital Loop (zones 1-3)	$73.25	$220.25	**201%**	$26.68	$86.81	**225%**
Dedicated Transport, DS1 Entrance Facilities (zones 1-3)	$73.25	$285.81	**290%**	$26.68	$112.75	**323%**

Again, given the fact that SWBT's labor costs are only marginally higher in Oklahoma and that many of these rates cut across urban, suburban, and rural zones, it is clear that SWBT's rates in Oklahoma "fall [] outside the range that the reasonable application of TELRIC principles would produce." Cf. New York Order ¶ 244.

SWBT's affiant James L. Jones attempts to defend the OCC's UNE pricing decision by relying on the fact that, at the time that the OCC issued its decision, the Eighth Circuit had vacated the Commission's pricing methodology and concluded that state commissions had "exclusive jurisdiction over the determination of rates for interconnection and unbundled

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63 Compare O2A, Appendix Pricing - UNE, Schedule of Prices at 7 (common transport termination MOU and facility mile MOU, zones 1-3), with T2A, Appendix Pricing - UNE, Schedule of Prices at 7-8 (same).

network elements." SWBT Br., Jones Aff. ¶ 34. To follow Mr. Jones' reasoning to its logical conclusion, if the OCC had ruled on UNE rates after the Supreme Court's decision in Iowa Utilities Board v. FCC, 525 U.S. 366 (1999), but before the UNE Remand Order,[64] then it would not have had to set rates for any elements -- as SBC argued that no elements were required to be unbundled at that time. Clearly that is not the relevant inquiry.

A BOC's Section 271 application must be judged by the legal requirements in existence at the time of the filing. See Texas Order ¶ 22 ("we evaluate [a BOC's] compliance with our rules and orders in effect at the time the application was filed"); see also New York Order ¶ 34. There is no doubt that the OCC's decision must be held to the legal standard in effect today -- it must comply with TELRIC. Moreover, Mr. Jones attempts to portray the OCC's UNE pricing decision as cost-based (by stating that the OCC "ke[pt] in mind" "forward-looking economic cost principles") is similarly unavailing. SWBT Br., Jones Aff. ¶ 35. Because the OCC's ruling adopted stipulated non-cost-based rates rather than setting fact-specific, cost-based rates, the Commission must reject SWBT's Section 271 application in Oklahoma.

* * * *

As the Commission has recognized, the absence of predictable, cost-based rates for interconnection and UNEs creates uncertainty for new entrants and stifles efficient entry into local markets. See South Carolina Order ¶ 204. Nor can such critical shortcoming be waved off with a promise that they will be dealt with later, as the KCC and OCC have done here. Many

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64 Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

rates that were installed as interim on a last-minute basis have not been available to CLECs until the actual availability of O2A and the K2A -- literally days before SBC filed this application.

As the Justice Department recently explained with regard to Verizon's last minute attempt to fix its previously non-cost-based rates in Massachusetts:

> The timing of Verizon's tariff filing is regrettable. If Verizon's previous UNE prices exceeded the relevant cost of those UNEs, the delay in correcting that defect likely slowed the development of competition in Massachusetts, particularly competition to serve residential customers.

DOJ Massachusetts Eval. at 20. In the instant case, the timing of the KCC's and OCC's last minute fixes is also regrettable. It is clear that the KCC's and OCC's eleventh hour rulings on a number of pricing issues are too little, too late. Nor are these pricing issues limited to a "few isolated ancillary items" or new elements, which the Commission found excusable in New York. See New York Order ¶ 258 (approving application despite interim rates for loop conditioning charges). The Commission "must be confident that a BOC will continue to comply with the pricing requirements contained in the competitive checklist after it has been authorized to provide in-region, interLATA service." Michigan Order ¶ 297. Where an endless procession of interim rates and non-cost-based permanent rates are in effect, as in Kansas and Oklahoma, the Commission cannot have such confidence.

SWBT has not demonstrated that it is offering UNEs and interconnection at cost-based rates. Absent cost-based rates, prices will not send the proper signals to encourage efficient entry. SWBT's application must be denied on this basis alone. See id. ¶ 287 ("we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry").

B. SWBT Does Not Provide Nondiscriminatory Access To OSS.

As noted, Section 271(c)(2)(B) further requires that a BOC provide nondiscriminatory access to OSS. 47 U.S.C. § 271(c)(2)(B)(ii); New York Order ¶ 84. For OSS functions that are analogous to functions the BOC performs for itself, a BOC must provide access to its OSS that permits competing carriers to perform these functions in "'substantially the same time and manner'" as the BOC. Id. ¶ 85 (citation omitted).[65] For OSS functions that are not analogous to those performed by the BOC for itself, the BOC must offer access that is "'sufficient to allow an efficient competitor a meaningful opportunity to compete.'" Id. ¶ 86 (citation omitted).

In making these determinations, the Commission considers first whether the BOC "'has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them.'" Id. ¶ 87 (citation omitted).

Second, the Commission considers "'whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter.'" Id. (citation omitted). To determine whether the BOC's OSS functions are operationally ready, the Commission will first look to actual commercial usage, which it has found to be "[t]he most probative evidence that OSS functions are operationally ready." Texas Order ¶ 98. Where such commercial usage is minimal or nonexistent, the Commission will alternatively consider independent third party OSS testing.

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[65] However, as discussed at 50, *infra*, where a BOC's retail performance is itself inadequate, parity alone will not ensure meaningful competitive opportunity.

Id.[66] The third party review will be given only minimal weight if it is "limited in scope or depth." Id.

In the instant application, SWBT has not provided either actual commercial usage data demonstrating nondiscriminatory access or sufficient independent third party testing data for either Kansas or Oklahoma, and thus has not demonstrated that it provides nondiscriminatory access to its OSS. For the majority of the performance measurements, SWBT has not produced sufficient data to establish operational readiness, and where it has, there are many deficiencies shown in the state-specific reporting. For the other measurements, the absence of commercial volumes has not been compensated for in accordance with FCC precedent; SWBT has not produced reliable, third party testing of its provisioning in these states. Moreover, as explained below, these deficiencies cannot be patched over by reference to Texas.

1. Where actual commercial usage data is available, SWBT reports substandard performance measurements.

For those measurements for which commercial volumes are present, SWBT's performance in Kansas and Oklahoma is out-of-parity for many critical indicators of nondiscriminatory treatment. Performing a state-specific review of the performance data reported by SWBT is clouded by SWBT's practice of reporting as many as twelve months of data with as few as four of those twelve months reported on a state-specific basis, and in some

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66 In reviewing SWBT's Texas 271 application, the Commission relied heavily on the actual commercial record, and on the third party testing where necessary. Texas Order ¶ 99.

cases, reporting only data aggregated across SWBT's five state region.[67] Notwithstanding the obfuscation presented by SWBT's data reporting, the following examples reveal that SWBT cannot demonstrate parity or benchmark performance even for the low volume of orders it reports as processed in Kansas and Oklahoma:[68]

Kansas

- **PM 13-03 -- Order Process % Flow Through - EDI**: This performance measurement reports the percentage of orders, from entry to distribution, that proceed through the SWBT EDI ordering system without manual intervention. In the five months of data reported for Kansas, the percent flow through for CLECs orders was 66.7% for May, 54.2% for June, 54.1% for August, and 78.1% for September, all quite substantially below the flow through percentage for SWBT's orders. SWBT Br., Dysart Aff., Attachment D at 32; SWBT Br., Dysart, Noland & Smith Aff., Attachment D at 32. This poor performance is particularly important as the Commission places "great weight" on the flow through capability of EDI interfaces because EDI is an industry standard application-to-application interface. Texas Order ¶ 180 n.489.

- **PM 9-02 -- % Rejects for EDI**: This performance measurement reports the percentage of total unique orders rejected by SWBT's EDI. In the five months of data reported for Kansas, the percentage of orders rejected by EDI was 67.7% for May, 31.6% for June, 28.8% for July, 40.5% for August, and 46% for September. SWBT Br., Dysart Aff., Attachment D at 28; SWBT Br., Dysart, Noland & Smith Aff., Attachment D at 28. These reject rates plainly fail to provide CLECs a meaningful opportunity to compete, particularly in light of the poor flow through rates for EDI in Kansas.

- **PM 59-01 -- % Trouble Report Within 30 Days -- 8.0 dB Loops**: This performance measurement reports the percentage of 8.0 dB loops that receive a customer trouble report within 30 days of the service order completion. In the most recent three months of data reported for Kansas (July to September), SWBT has consistently and substantially fallen short of parity. (July: 11.9% (CLECs) versus 3.4% (SWBT); August: 22.6% (CLECs) versus 3.3% (SWBT); September: 10.0% (CLECs) versus

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67 Furthermore, SWBT has admitted that the nine months of regional data reported is mostly from Texas. Transcript of Proceedings at rdh-163 (OCC Sept. 18, 2000) (App. C, tab 261).

68 Sprint does not intend this list to be exhaustive, but rather illustrative. Moreover, Sprint notes that for the majority of performance measurements in both states, SWBT reports no or fewer than ten points of data.

3.3% (SWBT)). SWBT Br., Dysart Aff., Attachment D at 110; SWBT Br., Dysart, Noland, & Smith Aff., Attachment D at 110.

- **PM 10.1-01 -- % Manual Rejects Received Electronically and Returned in 5 Hours**: This performance measurement reports the percentage of manual rejections that are received from the CLEC electronically and returned within 5 hours of the receipt of the local service request ("LSR"). In the five months of data reported for Kansas, SWBT missed the benchmark every month. The data for August shows that SWBT returned manual rejections in 5 hours only 75.1% of the time and in September only 82.9% of the time, falling far short of the 97% benchmark. SWBT Br., Dysart Aff., Attachment D at 30; SWBT Br., Dysart, Noland & Smith Aff., Attachment D at 30.

<u>Oklahoma</u>

- **PM 10.1-01 -- % Manual Rejects Received Electronically and Returned in 5 Hours**: This performance measurement reports the percentage of manual rejects received electronically and returned within five hours of receipt of the LSR from a CLEC. For the five months of Oklahoma specific data reported, SWBT's performance progressively worsened over time and as the number of rejects increased. SWBT has never met the 97% benchmark in Oklahoma, falling to 93.6% in July, 80.2% in August, and 82.9% in September. SWBT Br., Dysart Aff., Attachment C at 30; SWBT Br., Dysart, Noland & Smith Aff., Attachment C at 30.

- **PM 13-02 -- Order Process % Flow Through - LEX**: This performance measurement reports the percentage of orders, from entry to distribution, that proceed through the SWBT LEX ordering system without manual intervention. For the five months of Oklahoma data reported, SWBT's performance was consistently out of parity and degraded substantially (from 88.9% in July to 79.5% in August) when faced with a significant (42%) increase in order volume. SWBT Br., Dysart Aff., Attachment C at 32. In September, SWBT's performance for CLECs was still out of parity with its own performance even though the number of CLEC orders decreased from August by 25%. SWBT Br., Dysart, Noland & Smith Aff., Attachment C at 32. This demonstrates that SWBT's LEX processing is neither sufficiently reliable nor scaleable to demonstrate nondiscrimination.

- **PM 59-03 -- Provisioning Unbundled Network Elements, Percent Trouble Reports on N, T, C Orders within 30 Days -- BRI Loops**: This performance measurement reports the percentage of BRI loops that receive a customer trouble report within 30 calendar days of service order completion. SWBT was substantially out of parity for the most recent four months reported -- June through September. SWBT Br., Dysart Aff., Attachment C at 111; SWBT Br., Dysart, Noland & Smith Aff., Attachment C at 111.

These results demonstrate substandard, discriminatory provisioning of significant functions and alone disqualify this application for 271 approval. In an attempt to mask some of these problems, SWBT offers up region-wide data for the Commission to review (most of that data, of course, is generated in Texas).[69] But SWBT gives the Commission no basis for ignoring the statistically significant results that in fact reveal substandard performance.

The gap between SWBT's Texas performance and its Kansas and Oklahoma-specific performance in fact raises additional questions. Given that much smaller numbers of orders were processed for these two states than for Texas, one would expect that the burdens imposed on SWBT in the smaller states would be much lighter and that the resources necessary to satisfactorily process those orders would be more readily available. The Commission must question why Kansas and Oklahoma CLECs are experiencing such markedly inferior performance in comparison to SWBT's region-wide performance. The very fact that disparities exist establishes that there are problems specific to Kansas and Oklahoma that must be further scrutinized and addressed. As discussed in subsequent sections, the answer at least in part resides in the extensive degree to which SWBT has forced Kansas and Oklahoma CLECs to rely on manual processing.

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69 For example, SWBT relies on region-wide data for PM 13-02 in Oklahoma. Because its five months of data for LEX flow through in Oklahoma never reaches parity, SWBT focuses on its region-wide LEX flow through, which has averaged 90% over the last 12 months. See SWBT Br., Dysart Aff. ¶ 62. SWBT also relies on region-wide data for PM 13-03 in Kansas, stating that its flow through rate for EDI orders is 95.7% over the last twelve months for CLECs in its five state region. See id. ¶ 72. Not surprisingly, SWBT made similar claims in the state proceedings underlying its application at issue here. See, e.g., Second Reply Comments in Support of SWBT's Application for Section 271 Relief in Kansas, Lawson Aff. ¶¶ 34-36 (KCC Aug. 2, 2000).

Even where CLECs receive parity performance from SWBT (as demonstrated in certain performance measurements), it may be insufficient for these two specific states. For example, as the OCC has recognized with regard to missed due dates, "parity with a poor performance record for [SWBT] may not allow a CLEC the meaningful opportunity to compete in the [state's] Local Exchange market, because the CLEC's reputation with its customers and potential customers could be severely damaged by a 'parity' level of missed installation dates." OCC Final Order at 160-61. Moreover, the OCC recognized that "because CLECs are new to the local exchange marketplace, they may be harmed to a greater degree than [SWBT] when provisioning problems occur." Id. at 181 (noting in particular the effect of inaccurate loop make-up information on CLECs' advanced services offerings). Thus, SWBT may be able to report that it has met the benchmark for a particular performance measurement, but at the same time, effectively be performing in such a substandard manner as to maintain a competitive advantage over the CLECs. The Commission should not consider any level of substandard performance, whether or not it meets the specified benchmark, to be conclusive evidence that SWBT has provided nondiscriminatory OSS access.

2. There is insufficient actual commercial usage to demonstrate that SWBT's OSS is operationally ready.

This poor performance is all the more disconcerting in light of the absence of sufficient actual commercial volumes for many other performance measurements.[70] SWBT attempts to ignore this lack of state-specific data, arguing again that the "region-wide figures" used in the

[70] See, e.g., SWBT's Comments on Staff's Recommendation Regarding The Kansas 271 Application at 15 (KCC Aug. 31, 2000) (App. C, tab 272) (acknowledging as accurate the consultant's finding that "there is less data available in Kansas than in Texas" because there is less competition in Kansas).

Texas 271 application are sufficient for evaluating the Kansas and Oklahoma applications.[71] As discussed, the disparity between the performance data for Kansas and Oklahoma, as compared to regional data, establishes a strong disconnect between the state profiles and the regional profile in this area. Given this, there is no basis for relying upon regional data as an adequate proxy for those performance measurements where state-specific data is unavailable.

The Snavely King Report suggests strongly that in fact such extrapolation cannot be made between Texas and Kansas (or region-wide levels and Kansas) because the mere difference in market size does not alone explain the low number of observation points for the smaller states.[72] Snavely King observes the "dramatic difference in the level of CLEC activities between the two states," but reports that this difference is not explained by the relative sizes of these markets. Snavely King Report at 10. Although Kansas and Oklahoma are obviously smaller states than Texas, and thus expected to generate less CLEC activity in the aggregate, *CLEC activity in these states is disproportionately much smaller than in Texas*. Id.

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71 SWBT Br. at 22-23 (asserting that "[t]he same region-wide figures on which this Commission relied in the Texas Order demonstrate that SWBT's OSS [for Kansas and Oklahoma] are handling commercial volumes"). Moreover, because there are significant differences in SWBT's OSS for Texas compared to OSS for its other states, and because the Texas numbers are so much higher than those reported for other states, results reported on a "region-wide" basis can mask severe problems with those aspects of OSS that are state-specific. The factual differences in SWBT's Texas-based OSS compared with its OSS for Kansas and Oklahoma are discussed in Section IV.B.3, *infra*.

72 Snavely King Report at 10. Although the Snavely King Report was prepared specifically for the Kansas 271 proceeding, Snavely King notes that the report raises troubling concerns with respect to SWBT's OSS in Kansas, "or indeed, in any other relatively small state," such as Oklahoma. Id. at 13. The Snavely King Report was not the result of independent third party OSS testing, but rather simply an evaluation of the Performance Measurements and business rules in the Kansas 271 proceeding. Id. at 1.

In addition, CLECs in these states place a dramatically higher number of orders manually. During Snavely King's study period in Kansas, an astonishing 85% of the CLEC orders placed, for both resale and UNEs, were done so manually. Id. at 12.[73] Comparatively, only 48% of CLEC orders were placed manually in Texas during this time period. Id. Moreover, a mere 2% of CLEC orders were placed using SWBT's electronic data interface ("EDI"), which is the only OSS access for CLECs that FCC has found to be "truly competitive." Id.; see also Texas Order ¶ 180 n.489. There is comparable evidence for Oklahoma; there, too, roughly only 15% of Oklahoma CLEC orders have been submitted electronically, thereby requiring manual processing for an overwhelming majority of CLEC orders.[74]

The high percentage of manual orders itself precludes reliance on Texas since the latter reflects a much greater use of more reliable, electronic processes.[75] As the Snavely King Report

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[73] This overwhelming percentage no doubt understates the reliance on manual processing, because it does not account for electronic orders that subsequently fall out to manual processing.

[74] Testimony of Walt W. Willard on Behalf of AT&T Communications of the Southwest, Inc. at 59 (OCC Aug. 17, 2000) (App. C, tab 200).

[75] Michigan Order ¶ 196 (finding that it is "virtually impossible" for manually processed orders to be completed in the same time as orders that flow through electronically, and thus there cannot be nondiscriminatory access when Ameritech processes a significant number of CLEC orders manually); New York Order ¶ 137 (finding that without an integrated OSS system, CLECs would be forced to enter more pre-orders manually into the system, leading to "additional costs and delays, as well as a greater risk of error"). The Commission recognized that such a lack of integration places CLECs at a competitive disadvantage.

Indeed, in reviewing the performance measurements that track manual processes in Kansas and Oklahoma and for which sufficient data are reported, it is evident that these processes are not only slower, but that SWBT is not always meeting the requisite benchmark in its provision of services involving manual processes. See SWBT Br., Dysart Aff., Attachment C at 30 & Attachment D at 30; Dysart, Noland & Smith Aff., indicates, it is highly unlikely that Kansas CLECs have access to SWBT's OSS that is comparable to SWBT's retail operations when 85% of CLEC access is "through slow and error-prone manual processes." Id. at 12. Texas data, or region-wide data (which is in fact mostly Texas data), simply does not reflect the "error-prone" outcomes that are likelier with manual processing. At a minimum, the greater use of manual processing underscores the need to scrutinize SWBT's provisioning specific to Kansas and Oklahoma. Such an evaluation, as discussed below, has not yet occurred.

3. The Telcordia Report is insufficient and inapplicable to Kansas and Oklahoma and should not be considered adequate third party testing.

As the Commission has stated, operational readiness is best shown by commercial volumes, but where these are not present, third party testing may be used. Texas Order ¶ 98. Notwithstanding its inability to produce state-specific demonstrations of satisfactory commercial volumes, SWBT ignores Commission precedent and fails to offer state-specific, independent third party testing for Kansas and Oklahoma. Instead, it argues that its OSS is regional and that the Telcordia testing performed in Texas is "good enough" evidence of compliance in Kansas and Oklahoma (SWBT Br. at 21-22), notwithstanding express disclaimers in Texas that Telcordia's work was for Texas alone.[76]

Attachment C at 30 & Attachment D at 30 (SWBT has not met the benchmark for PM 10.1-01 (percent manual rejects received electronically and returned in five hours) in five months of data provided for Oklahoma or Kansas); see also Dysart Aff., Att. D at 17; Dysart, Noland & Smith Aff., Att. D at 17 (SWBT has not met the benchmark for PM 5-16 (percent firm order confirmations received within 24 hours - manual) in Kansas in four out of the last seven months).

[76] See Telcordia Report at 2 ("This Report and its individual sections have been prepared solely for the TPUC's regulatory purposes and should not be used for any other purpose").

As an initial matter, the FCC should find the absence of state-specific testing fatal to SWBT's Section 271 application for the simple reason that Telcordia did not test all currently relevant OSS functions. At the time of the Texas filing, SWBT's legal duties did not include a number of obligations that subsequently became effective, and thus there was no evaluation by Telcordia of SWBT's compliance on these issues. Both the Kansas and Oklahoma state commissions chose not to require testing, even though SWBT was legally obligated to provide non-discriminatory access as of the filing date and even though there was no evidence of commercial volumes demonstrating satisfactory performance. See Kansas Staff Recommendation, Executive Summary at 8 ("SWBT's compliance with the line-sharing requirements is difficult to confirm due to lack of commercial volumes and OSS testing for the specific line sharing system functions"). Similarly, the OCC found SWBT compliant with a large number of obligations flowing from the UNE Remand Order solely by reference to their theoretical availability under the O2A, including nondiscriminatory "access to dark fiber, sub-loop unbundling, local switching, tandem switching, signalling network, call-related databases [Calling Name Database, 911 Database, and E-911 Database], line conditioning, and information on loop qualification." OCC Final Order at 166.

SWBT claims that no further testing of its OSS is required because the Commission has already reviewed and approved the "very same systems, interfaces, resources, and procedures that SWBT provides to CLECs in Kansas, in Oklahoma, and throughout its five-state region." SWBT Br. at 19. This assertion, however, wholly ignores the extent to which the SWBT OSS is *not* regional, most especially with respect to back-end systems. SWBT operates two data processing centers, one in Dallas, TX and the other in St. Louis, MO, that serve SWBT's entire five state region. For back-end systems, these centers are each generally dedicated to distinct states: as SWBT has admitted, Texas orders are processed in the Dallas center, and orders for Missouri, Oklahoma, Kansas and Arkansas ("MOKA") are processed in the St. Louis center. SWBT Response to MCIW D.R. 1, 1-III.D(13) (OCC July 25, 2000). SWBT has also acknowledged that Telcordia tested the SORD processor only in the Dallas center, and that data contained in each center's PREMIS system is state-specific for Texas and MOKA, respectively.[77] SWBT Response to Sprint D.R. 1, 3 (OCC Aug. 8, 2000). The Texas Telcordia test thus does not provide a basis for concluding that orders submitted by CLECs in Kansas and Oklahoma are actually processed in a nondiscriminatory manner.

SWBT has in fact acknowledged that its ordering process is not "the same" region wide. SWBT witness Ham stated that some CLECs that started using SWBT's EASE system for resale ordering in one state, required "'brush-up' coursework on the EASE system when their operations expanded into additional SWBT states." E. Ham Affidavit at 34 (OCC June 9, 2000); see also MCIW Comments at 6 (OCC Aug. 17, 2000). Ms. Ham attempted to explain this need for additional training by stating that some state regulations may require different types of entries into the OSS systems. Transcript of Proceedings at rdh-125 (OCC Sept. 18, 2000). It is irrelevant, however, why different entries may be required from state to state. SWBT cannot

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77 The Service Order Retrieval and Distribution ("SORD") system is a mechanized, on-line service order processing system that can create, store, edit, maintain, and distribute service requests for the purpose of establishing, disconnecting or changing a customer's services. Ernst & Young, Report of Independent Accountants, Attachment A (Oct. 24, 2000). The PREMIS system is one of SWBT's two internal address databases. Texas Order ¶ 177.

escape the fact that the manner in which CLECs use its OSS varies from state to state, and thus is not the same region wide.

Even if the electronic systems in Dallas and St. Louis were exactly the same (which they are not), the SWBT employees who install, update, operate, and repair these systems and who manually process orders that do not flow through electronically, are different. MCIW Comments at 5 (OCC Aug. 17, 2000). Because the Telcordia testing and Report addressed only the extent to which those problems were present in *the Dallas center*, SWBT must independently demonstrate that CLECs are receiving nondiscriminatory access to *the St. Louis processing center*. The need to test the St. Louis center specifically for Kansas and Oklahoma is especially great given that the orders processed manually far outnumber orders electronically processed. As noted, the Snavely King Report found during its study period that 85% of CLEC orders in Kansas were submitted and processed manually. Snavely King Report at 12.

Nor can SWBT argue that manual processing need not be tested. In fact, the Telcordia Report emphasized the importance of its testing of manually processed orders in the Dallas center. Telcordia found that in Texas CLEC pre-ordering and ordering transactions are processed through a combination of electronic and manual processes. Telcordia Report at 22. Manual processing was found to affect "all five OSS categories." Id. Thus, application of the parameters employed in the Telcordia test requires testing of the St. Louis center's manual processes for Kansas and Oklahoma.

Several commenters in the Kansas proceeding highlighted the lack of performance measures that report the error introduced by SWBT when manual intervention is required for an electronically placed order. See AT&T Comments at 16; Birch Comments at 8 (KCC July 19, 2000). For example, Birch discovered, through its own observations, that for those LSRs that SWBT's OSS cannot process electronically and must be manually re-entered by SWBT, SWBT introduces error on approximately 36% of these orders. Birch Comments at 8. Obviously, Birch was unable to cite to the rate of error introduced for all CLECs because there is no performance data available for this type of manual processing. Id.

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The Commission has repeatedly made clear that in assessing Section 271 applications, it looks to the totality of the circumstances. See New York Order ¶¶ 46, 60, 82, 169, 174, 193, 209, 274; Texas Order ¶¶ 46, 58, 138, 154. Certain non-decisional flaws may be outweighed by the overall evaluation of competitive opportunities. Here, we have none of the factors that gave the FCC confidence in Texas and New York: there are not commercial volumes for a large number of performance measurements; there has not been third party testing of any sort; and there is no real competition in evidence.

C. SWBT Fails To Provide Nondiscriminatory Access to xDSL Loops.

1. SWBT does not provide nondiscriminatory ordering and provisioning processes for xDSL loops.

Sections 271(c)(2)(B)(ii) and (iv) require SWBT to provide access to xDSL loops and attendant OSS functions on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 271(c)(2)(B)(ii), (iv). Without access to xDSL loops, "competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of the deployment of advanced services." UNE Remand Order ¶ 190. Given the "critical importance" of xDSL loop provisioning to the deployment of advanced services, the Commission has indicated that it will closely examine whether a BOC is providing nondiscriminatory access to xDSL loops. See New York Order ¶ 330.

As explained in the Morris Affidavit, the Sprint-specific data *reported by SWBT* for the provisioning of xDSL loops demonstrates problems that Sprint has experienced in obtaining nondiscriminatory provisioning of xDSL loops for ION. Morris Aff. ¶ 13. PM 60 - Percent Missed Due Dates Due to Lack of Facilities (xDSL) tracks the percentage of UNEs (xDSL loops) with missed committed due dates due to lack of facilities. Id. In March, April, and May, 19.4%, 10.9%, and 4.5%, respectively, of Sprint's missed due dates were caused by lack of facilities. Id. In contrast, for each of those months, SWBT missed only 0.1% due dates because of lack of facilities for its own orders. Id. Similarly, in June and August, 11.8% and 9.5% of Sprint's missed due dates were caused by lack of facilities, compared to SWBT's 1.2% in June and 0% in August. Id.

Furthermore, SWBT's data also indicates that it has consistently failed to provision xDSL loops for Sprint on the committed due date. Id. ¶ 14. PM 58 - Percent SWBT Caused Missed Due Dates (xDSL) measures the percentage of UNEs (DSL loops) for which installations are not completed by the committed due date. Id. The reports for PM 58 show that SWBT has provided better service to itself five out of the seven months for which Sprint had orders (March -- 27.8 % of Sprint's due dates missed compared to 3.2% for SWBT; April -- 30.4% for Sprint compared to 9.6% for SWBT; July -- 7.4% for Sprint compared to 3.3% for SWBT; August -- 28.6% for Sprint compared to 3.1% for SWBT; September -- 5% for Sprint compared to 4.3% for SWBT). Id. In addition, the average delay days for SWBT caused missed due dates experienced by Sprint exceeded that experienced by SWBT (PM No. 62) in March, April, and May by 8.53 days on average. Id.

Other carriers have also experienced problems with SWBT's xDSL loop provisioning in both Kansas and Oklahoma. Specifically, IP Communications explained below the types of problems that can arise when SWBT fails to provide accurate loop information.[78] For example, if SWBT reports that the loop length is too long to provide the xDSL service, then IP will deny service to a customer that actually could be served.[79] Alternately, if SWBT reports that the loop length is short enough to provide a particular service, IP will inform its customer that the service is available only to find out "[a]t some point in time either on [the] due date or after the loop is provisioned by SWBT . . . that the DSL service can not be made operational due to loop length."

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[78] Faced with similar complaints from Texas CLECs regarding inaccurate loop qualification information and provisioning problems, the Texas PUC adopted a new version of performance measurements, Version 1.7, during its six-month review of those measurements. Section 271 Compliance Monitoring of SWBT, Project No. 20400, Order No. 13, Attachment B at 2 (TPUC July 24, 2000) (concluding that the "accuracy of actual loop makeup information is both competition affecting and customer affecting"). Version 1.7 includes PM 1.2, a new measurement designed to measure the accuracy of the loop information provided to the CLEC by comparing "reported loop makeup information to actual loop makeup information on the loop provided to the CLEC." See SWBT Br., Dysart Aff., Attachment F at 5 (PM 1.2). Under PM 1.2, SWBT must meet a benchmark of either 95% accuracy or parity with SWBT's DSL retail, SWBT's DSL affiliate, or other CLECs, *whichever is higher*. Id. The KCC and OCC have adopted Version 1.7 of the performance measurements, including PM 1.2, on a going forward basis. See SWBT Br., Dysart, Noland, & Smith Aff. ¶ 4 n.1.

[79] See Prefiled Testimony of Jo Gentry, filed on behalf of IP Communications Regarding Oklahoma 271 Issues at 29 (OCC Aug. 17, 2000) (App. C, tab 191) (Gentry Test.) .

Gentry Test. at 28.[80] Covad and others have raised similar issues regarding problems obtaining accurate data from the BOCs, including SWBT.[81]

Nor are SWBT's arguments during the proceedings below availing. Contrary to SWBT's representations, the FCC was *extremely* careful to explain in the Texas Order that "for the purposes of this proceeding, we evaluate whether SWBT is in compliance with the regulatory requirements in place on the date of its section 271 filing, and *do not consider whether SWBT complies with the new loop qualification requirements that took effect on May 18, 2000*." Texas Order ¶ 165 (emphasis added); see also id. ¶ 30 & n.70. The Commission further clarified that, after the effective date of the UNE Remand Order, "future section 271 applicants must demonstrate compliance with the new requirements." New York Order ¶ 140 n.420; see also Texas Order ¶ 32.

SWBT's aggregate performance record for xDSL in Kansas, as detailed below, further confirms that competitors are not receiving access to xDSL on a nondiscriminatory basis:

- **PM 58-09 -- % SWBT caused missed due dates DSL**: This performance measurement reports the percentage of DSL loops for which SWBT fails to complete installation by the negotiated due date. CLECs began ordering DSL

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80 Not only is the CLEC "out the costs associated with procuring the customer, but the appearance is [also] left that [the CLEC] has mishandled the sale." Gentry Test. at 28. As the OCC has recognized, "because CLECs are new to the local exchange marketplace, they may be harmed to a greater degree than [SWBT] when provisioning problems occur." OCC Final Order at 181.

81 See, e.g., FCC Line Sharing Workshop, Oct. 31, 2000 at 10, attached to Letter from Jodie Donovan-May, Policy Division, CCB, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-217 (Nov. 2, 2000); IP Communications Comments Regarding SWBT's Application as it Relates to Terms, Conditions, and Rates for UNEs that Support Advanced Services at 7 (KCC July 19, 2000) (App. C, tab 247) ("IP Comments") ("one of the most severe operational issues" faced by CLECs today is inaccurate loop qualification information).

loops in March 2000, and since that time have placed a total of 541 orders. In March, SWBT missed 27.8% of CLEC due dates, compared with only 3.2% of SWBT due dates. Similarly, in April, SWBT missed 21.4% of CLEC due dates and 9.6% of SWBT due dates. While SWBT met parity for May and June, this trend did not continue, and in July, SWBT missed 13.7% of CLEC due dates, compared with 3.3% for SWBT missed due dates. August reflects even worse performance by SWBT -- CLEC due dates were missed 20.8% of the time, compared to 3.1% for SWBT, and in September 8.3% of CLEC due dates were missed, compared to 4.3% for SWBT. See SWBT Br., Dysart, Noland & Smith Aff., Attachment D at 108.

- **PM 60-08 -- % missed due dates due to lack of facilities DSL**: This performance measurement reports the percentage of DSL loops with missed committed due dates due to lack of facilities. In the seven months of reported data, SWBT has only provided CLECs service in parity with its own for one month. On average, SWBT missed 5.7% of CLEC due dates, but almost never (0.3%) missed its own due dates. Id. at 116.

- **PM 61-08 -- average delay days due to lack of facilities DSL**: This performance measurement reports the average number of days that pass from the due date to the completion date on SWBT missed DSL loop orders due to lack of facilities. CLECs began ordering DSL loops in March 2000. Since then, SWBT has met the benchmark in two out of seven months. As noted in PM 60-08, SWBT met all of its own due dates in both July, August, and September, and thus had no delay days to report in PM 61-08. CLECs, however, experienced an average of 6.50 delay days in July, and an abysmal average of 21.40 delay days in August. Id. at 128.

2. SWBT fails to timely process LNP cancellation notices for xDSL loops, resulting in service outages for Sprint's customers.

The Section 271 checklist requires SWBT to provide nondiscriminatory access to unbundled loops. See 47 U.S.C. § 271(c)(2)(B)(ii), (iv). It also requires SWBT to comply with the Commission's regulations on number portability. Id. § 271(c)(2)(B)(xi).[82] These rules in turn require SWBT to provide number portability that "does not result in *any degradation in*

[82] The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30).

service quality or network reliability *when customers switch carriers*." 47 C.F.R. § 52.23(a)(5) (emphasis added). In addition to compliance with each separate checklist item, the Commission has also interpreted a BOC's obligations under Section 271(c)(2)(B)(iv) and (xi), taken together, "to mean that the BOC must demonstrate that it can coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption." Louisiana II Order ¶ 279. In evaluating Bell Atlantic's performance in New York, the Commission indicated that, along with meeting other criteria, evidence "that fewer than five percent of hot cuts resulted in service outages" constituted a "minimally acceptable showing" for this checklist item. New York Order ¶ 309; see also Texas Order ¶¶ 257, 262-273.

SWBT cannot meet even this minimal showing for Sprint in Kansas. As documented in the attached Morris Affidavit, most customers during the ION testing phases continued to subscribe to SWBT local exchange service in addition to ION. Morris Aff. ¶ 15. Indeed, even now that Sprint is entering the commercial phase of ION and is charging for the service, a significant number of customers continue to receive SWBT local service. Id. Due in part to operational difficulties and in part to customer preference, Sprint cancelled a number of the early porting requests that occurred during the test phases. Id. To ensure that customers would not suffer service outages while additional testing was conducted, Sprint subsequently instituted a temporary moratorium on any porting on August 2, 2000. Id. While Sprint continued to install ION during this period, it did not resume porting again until October 19, 2000. Id. On that date, Sprint began the process of porting the remaining back-up, SWBT local exchange lines of its ION residential customers to Sprint, a process which, as noted earlier, is still underway. Id.

Sprint is unable within the time frames given to determine the number of porting requests it placed with SWBT specifically for Kansas, but SWBT's performance measurement reports (PMs 114, 114.1, and 115) for Sprint indicate that SWBT ported 30 FDT LNP orders for Sprint in August and September. Id. ¶ 16. Sprint's own records show that its customers experienced service outages 23% of the time. Id. All of the service outages resulted directly from SWBT's failure to process cancellation requests in a timely manner. Id. In each instance, Sprint submitted a cancellation order and received either written or verbal confirmation from SWBT that the cancellation order had been received and would be processed. Id. Despite these confirmations, customers that had their port dates rescheduled (or otherwise had requested different port dates) experienced service outages. Id.

These problems do not appear on the SWBT performance measurement results because there is no measurement that reports failure to process cancellation orders. Id. ¶ 17. (While precise data are not available because Sprint did not track LNP problems until late July 2000, Sprint employees experienced similar difficulties in June, the only other month for which SWBT reports FDT LNP cutovers. Id.) As discussed earlier, these problems needlessly created additional problems for Sprint in bringing Sprint ION to market. Id.

AT&T has experienced similar problems with early or delayed FDT cutovers. See Direct Testimony of Mark Van de Water on Behalf of AT&T and TCG at 17 (KCC July 14, 2000) (App. C, tab 238) ("Van de Water Direct Test."). As AT&T notes, not only will an early FDT cutover place AT&T's customers immediately out of service, but, because SWBT is not required to wait for authorization to begin the FDT process, "the risk of an early cut (due perhaps to *SWBT's inability to timely process supplemental orders*) is [also] magnified." Id. (emphasis added). Not surprisingly, then, AT&T's reconciled data for Kansas City (both Kansas and Missouri) indicates that orders placed using the FDT process experienced over two times the outage rate for CHC hot cuts. Id. at 29. "Specifically, for April and May, 25.8% of AT&T's orders sent using the FDT process, and 32.1% of the lines involved in those orders, experienced an unexpected outage." Id. (as compared to 11.8% outages on CHC orders and 10.0% on CHC lines).[83]

Because many of these service outages (such as those caused by SWBT's defective loop cuts and certain delayed cuts) are not captured by the performance measurements, review of the performance data alone overstates the quality of SWBT's cutover performance. Id. at 24. Even so, a review of those measurements for which LNP performance is reported reveals that SWBT has not demonstrated that it is providing nondiscriminatory access to ported loops:[84]

- **PM 96-02 - % Premature Disconnects for LNP Orders - LNP with Loop:** This performance measurement also measures the percentage of stand alone LNP telephone numbers for which SWBT disconnects the customer (e.g. switch translations are removed) prior to the scheduled start time for LNP with loop orders. SWBT only has three months of data reported for this measure. In June, it had 44 conversions, 39 or 88.64% of which were disconnected prematurely. In July and September, SWBT had only five and eleven orders, respectively; none of which was prematurely disconnected. Of course, neither of these months demonstrates that SWBT is capable of meeting this benchmark or providing

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[83] Of course, the competitive impact of these outages is great. It not only causes a substantial hardship on the CLEC's customers, it also "materially undermine[s] the customers' relationship with [the CLEC] as well as tarnish[es] its reputation as an efficient and reliable service provider, thereby crippling [the CLEC's] ability to compete." Van de Water Direct Test. at 30.

[84] Similarly, SWBT's performance concerning stand alone LNP has not been in compliance. For example, for PM 96-01, which measures the percentage of premature disconnects for LNP only, SWBT was out of compliance for June, July, and August, the only months for which SWBT provides state-specific performance, in both Kansas and Oklahoma. See SWBT Br., Dysart Aff., Attachment C at 173 & Attachment D at 173.

scaleable service in Kansas with regard to this measure. SWBT Br., Dysart, Noland & Smith Aff., Attachment D at 173.

- **PM 97-02 - % of Time SWBT Applies the 10-Digit Trigger Prior to the LNP Order Due Date - LNP with Loop**: This performance measurement reports the percentage of time SWBT applies the 10-digit trigger, where technically feasible, for LNP with loop TNs prior to the due date. SWBT has not met the benchmark two out of the four months for which it is has data. In June and July, the 10-digit trigger was implemented on only 88.46% and 73.91%, respectively, of the orders. While it met the benchmark in August and September, SWBT had the fewest orders to provision (30 in August and 18 in September) as compared to 52 in June and 69 in July. Id. Thus, SWBT has not demonstrated that if it can provide scaleable service in Kansas with regard to this measure.

SWBT fails to demonstrate that it is porting FDT LNP cutovers with minimum service disruptions, and therefore fails to demonstrate that it meets this checklist item.

D. Sprint's Collocation Problems

Further, both the prices and processes necessary for collocation for advanced services such as Sprint ION are not adequate. With regard to processes, Sprint has confronted problems in obtaining collocation. These difficulties were reported to both the Kansas and Oklahoma Commissions and are already in this record.[85] In the case of the KCC, the staff expressed its concern for Sprint's experience as well as its concern that SWBT might act to promote Project Pronto to the disadvantage of competitors, but opted to defer the matter to the collocation tariff review docket. Kansas Staff Recommendation at 10 ("While Sprint's difficulties should be acknowledged, apparently this incident was hampered even further by ineffective communication. Staff cautions that SWBT, in an effort to further the objectives of Project Pronto, should not be permitted to thwart a CLEC's attempts to collocate at a remote location. If

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85 See KCC Staff Recommendation at 9 (citing Thompson Aff. ¶¶ 4-9 (filed July 19, 2000)); OCC Final Order at 128.

Sprint or another CLEC continues to experience difficulty with the collocation process, it should be addressed during the six month review of the terms and conditions of the collocation tariffs, as provided for in the stipulation and agreement reached in Docket No. 00-SWBT-733-TAR").

In the case of the OCC, it declined to resolve the merits and dismissed the problems as isolated and thus insufficient to overcome the overall finding of checklist compliance. This collective dismissal of deeply troubling evidence of SWBT's failure to cooperate alone warrants heightened review by the FCC. For example, SWBT had attempted to excuse its conduct in Kansas in part by explaining that Sprint approached SWBT about remote terminal collocation based on the FCC's November 1999 UNE Remand Order, which it described as "a draft" and further explaining that "the final FCC order was not placed on the Register [sic] until February 17, 2000." Reply Affidavit of Donna T. Halwe at 3 (KCC filed July 27, 2000). Apparently, because the effective date for implementation was not until May 17, 2000, SWBT felt it was under no obligation to even discuss the matter with Sprint until (at the earliest) federal register publication when the "draft" became final. Sprint trusts the competence of SWBT's lawyers to know much better than that.

As discussed earlier, SWBT is not providing collocation on rates and terms that are just, reasonable and nondiscriminatory as required by the Act. Despite the fact that the Commission declared ICB rates insufficient for Section 271 purposes nearly three years ago, SWBT did not replace its ICB pricing in Kansas and Oklahoma with standard collocation rates until earlier this year, and even then, it replaced those rates with interim rates. KCC Collocation Order ¶ 8; OCC Collocation Order at 3. Responding to complaints that SWBT's existing ICB prices were disproportionately high when compared to other states, the KCC approved SWBT's proposed rates as interim rates. KCC Collocation Order ¶¶ 8, 17. Similarly, faced with allegations that SWBT's were among the highest in the nation, the OCC replaced ICB rates with interim rates subject to true-up in May (even then, the new rates were interim, subject to true-up). OCC Collocation Order at 3-4, 10.

V. GRANT OF SWBT'S APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST.

Because SWBT fails to meet threshold issues under Section 271 here, the Commission need not address further the public interest implications of SBC's entry in Kansas and Oklahoma; it is necessarily contrary to the public interest. Nevertheless, to the extent the Commission wishes to consider public interest factors, it is equally clear that the application cannot be granted.

The Commission has previously recognized that its duty to evaluate whether an application is in the public interest is a duty distinct from and independent of the other preconditions to 271 relief:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy.[86]

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[86] Michigan Order ¶ 389; see also New York Order ¶ 423 ("[T]he public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination.").

Thus, the Commission has determined that its public interest evaluation must include an assessment of the status of local competition throughout the state and its prospects for future growth, the threatened effects on long distance markets, the likelihood that backsliding will not occur, and other factors. As articulated in the New York Order, the Commission views "the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open…." Id. ¶ 423.

As discussed in Section II *supra*, competitive levels in Kansas and Oklahoma are exceptionally limited, and for Kansas residential consumers, *de minimis*. And as discussed in Section IV.B., *supra*, the small amount of CLEC activity in both of these states is wholly dependent upon manual processing of orders, thereby guaranteeing far more errors in SWBT's wholesale provisioning even assuming the best of intentions, and ultimately discouraging entry by others. There are very few areas in which commercial volumes are available to demonstrate CLECs' success in obtaining necessary inputs, nor is there any independent testing to suggest even theoretical opportunities for nondiscriminatory access. And the fact that the ink on the x2As could not have dried between the time they became effective and the date of SBC's 271 filing also counsels that any confidence in the openness of the Kansas and Oklahoma markets at this time would be false.

Even where the local markets can be shown to be open, there must also be assurance that markets will be open thereafter -- specifically, whether the BOC will continue to satisfy the requirements of Section 271 after it receives long distance authority. Id. ¶¶ 423, 429. The FCC has stated that the fact that a BOC is subject to performance monitoring and enforcement is "probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest." Id. ¶ 429. However, the enforcement mechanisms adopted in Kansas and Oklahoma have not been demonstrated to be effective in those states. As such, there is no credible evidence that SWBT will meet its 271 requirements after it receives 271 approval.

A. The Performance Remedy Plans Are Not Specific To The Current State Of The Markets In Kansas And Oklahoma, And They Cannot Ensure That SWBT Will Not Backslide In Its Performance Post-271 Approval.

The Performance Remedy Plans adopted in Kansas and Oklahoma originated from the Performance Remedy Plan in the T2A approved by the Texas PUC. Neither the Commission in Kansas nor in Oklahoma engaged in a detailed, collaborative process to determine whether the T2A Performance Remedy Plan provisions will translate effectively to their respective states. In fact, the only evidence available suggests strongly that the Texas plan does not export well into these much smaller states.

Although the KCC Staff recommended the remedy plan based on the T2A, it expressed strong concerns in several respects about the efficacy of the plan in Kansas. It also noted on several occasions that it did not have the requisite time to fully consider or adopt appropriate changes to the plan. See Kansas Staff Recommendation at 132-134 (KCC Aug. 21, 2000) (App. C, tab 259). Forced to accede to SBC's artificially short deadlines, the Staff resolved to fix problems only after the fact, i.e., that it will rely upon the KCC's authority to review the plan every six months in order to determine whether some of the changes recommended by CLECs should be adopted. In Oklahoma, the OCC abandoned mid-course a separate proceeding to determine the performance measures and remedy plan and adopted almost wholesale the T2A remedy plan without completing what it initially had decided would be necessary: to develop its own state-specific performance remedy plan.

The FCC previously has relied upon the lengthy collaborative processes of the states with the BOC and CLECs to arrive at an enforcement plan that appropriately captures the BOC's performance and establishes appropriate incentives for the BOC to continue providing checklist compliant performance after it receives section 271 approval. See Texas Order ¶ 423. The FCC has laid out the key elements that ensure the effectiveness of a performance enforcement plan. They are, as follows:

- "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate."

New York Order ¶ 433. Several of these key elements are simply absent here, as discussed below.

Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards. The Kansas and Oklahoma plans, like the Texas plan, are calculated primarily on a per occurrence basis. That is, the amount paid by SWBT to CLECs for its failure to meet the performance measures is based on the volume of CLEC transactions with SWBT. Because the present volume of transactions is low in both states and because the penalties per measurement missed are in some instances very low (as minimal as $25), the amount of money at risk for SWBT under the plan is exceptionally small.[87] The result is that SWBT may engage in discrimination against CLECs and pay very little for doing so, thus impeding competition in Kansas and Oklahoma. Notably, the FCC found that the "Texas Commission established a performance remedy plan that would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business." Texas Order ¶ 423. However, that has not happened here. Neither the KCC nor the OCC have engaged in a process to determine whether the plan in Texas will be effective in Kansas and Oklahoma where there is very little volume of CLEC orders for SWBT to handle compared to Texas.[88] Thus, it may be beneficial for SWBT to absorb the penalties for missed measures as the cost of impeding competition in Kansas and Oklahoma.[89]

Significantly, the Kansas Staff joined the CLECs in raising concerns that the penalty payments may not be large enough. See Second Addendum to Kansas Staff Recommendation at 19 (KCC Sept. 28, 2000) (App. C, tab 288). Indeed, it stated that only practical experience will

[87] See AT&T's Comments at 19 (OCC Aug. 17, 2000) (App. C, tab 195) ("AT&T submits that if SWBT's volume-driven Texas remedy plan is transferred to a state like Oklahoma, in which CLECs are using SWBT interconnection, resold service, and UNEs in relatively small quantities, that plan cannot be expected to provide a meaningful ongoing incentive to comply with the Act.").

[88] Similarly, the Snavely King Report noted that the list of performance measurements adopted in Texas "does not ensure that they are suitable in Kansas. In Kansas, SWBT must stand on its record in that state, not in Texas." Snavely King Report at 8.

[89] The penalties indeed need to be quite high to adequately deter misconduct. This fact can be readily observed in SWBT's recent statements that it will try to sell Ameritech's SecurityLink monitoring business by February 9, as required by the FCC, but if it cannot find a buyer it will pay the U.S. Treasury $1 million. See Communications Daily at 6 (Oct. 30, 2000). This statement reflects a markedly open confession that legal compliance for SBC reduces to merely a cost-benefit analysis, i.e., whether compliance with the law will cost more money than non-compliance.

demonstrate whether the penalties are large enough to influence SWBT's behavior. Rather than requesting that it have the opportunity to collect data over a period of time to determine whether the Texas penalties are appropriate in Kansas, the KCC Staff stated that it will review the levels of performance on a going-forward basis and will petition the KCC for amendments to the plan as needed.[90] However, as the KCC Staff acknowledged, competition in the local market is still in its infancy. See Kansas Staff Recommendation at 113. Through targeted discriminatory behavior, SWBT will be able to discourage competitors from providing certain services or deter entry altogether; the KCC Staff's "opportunity" to determine whether or not the penalties in the Performance Remedy Plan are sufficient could become wholly academic.

Likewise, the KCC Staff questioned whether SWBT's $45 million annual cap on penalties in Kansas will provide SWBT with adequate incentive to behave in a nondiscriminatory manner. The KCC Staff stated, "[t]his does not appear to be a significant dollar amount for a company the size of SWBT, or SBC more generally, to place at risk." Kansas Staff Recommendation, Section II at 51. The same holds true for the annual cap in Oklahoma which is only $44 million. While SWBT's caps for Kansas and Oklahoma are calculated in a manner consistent with Bell Atlantic's cap in New York and SWBT's cap in Texas, the FCC has stated that "it is important to assess whether liability under an enforcement mechanism . . . would actually accrue at meaningful and significant levels when performance standards are missed. Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread

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90 In addition, the Staff states that it is relying upon the FCC to use its enforcement authority if the plan does not provide SWBT the incentives to perform "up to the required standards." Kansas Staff Recommendation at 60-62.

performance failure." New York Order ¶ 437. Moreover, the FCC found that the New York PSC had placed sizable penalties on the most critical performance areas. Id. To the contrary, the KCC and the OCC have not outlined the critical performance areas in their respective states or whether the penalties are sufficient to dissuade SWBT from performing poorly with regard to those areas. In addition, the concerns raised by CLECs that the "per occurrence" penalty amounts are not sufficient to prevent backsliding have not been specifically addressed by the KCC or the OCC.[91]

A reasonable structure that is designed to detect and sanction poor performance when it occurs. The KCC Staff, not having enough time to thoroughly study identified problems with the Performance Remedy Plan or to recommend solutions to the KCC, instead noted several problems for the KCC to consider and vowed to study them in the future. These problems exist for both Oklahoma and Kansas. Under these circumstances, the FCC cannot find that the KCC and OCC plans are reasonably structured "to detect and sanction poor performance." Id. ¶ 433.

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91 See, e.g., AT&T Comments Regarding SWBT's Proposed "Oklahoma 271 Agreement" at 21-22 (OCC Aug. 17, 2000) (App. C, tab 195) ("AT&T O2A Comments"); AT&T Comments Regarding SWBT's Proposed "Kansas 271 Agreement" at 14-16 (KCC May 22, 2000) (App. C, tab 219) ("AT&T K2A Comments"). Under the Performance Remedy Plans for Kansas and Oklahoma, once SWBT's liability to a CLEC surpasses $473,000 in Kansas and $459,000 in Oklahoma, then SWBT may pay any remaining penalties to that CLEC in escrow and bring an expedited proceeding before the respective state Commission in order to show why it would be unjust to require SWBT to pay damages in excess of the threshold amount. See O2A, Att. 17, § 7.3.1; K2A, Att. 17, § 7.3.1. The Texas Performance Remedy Plan provides that this procedure is not available to SWBT until $3.3 million has been paid to a CLEC. It is disputed as to whether the difference in these rates is justifiable. See AT&T O2A Comments at 30-31; AT&T K2A Comments at 36-37. Nevertheless, these lower amounts permit SWBT to litigate the amount of penalties owed to individual CLECs sooner than in Texas and impact the "self-executing" nature of the Kansas and Oklahoma plans. Thus, the Kansas and Oklahoma plans permit SWBT to engage in lengthy and costly disputes with CLECs regarding its performance and penalties owed to CLECs much sooner than the Texas plan.

First, the KCC Staff warned that SWBT's Performance Remedy Plan does not properly take into account the random variation that may occur during the formulation of the statistical results under the plan. Kansas Staff Recommendation at 134. Neither the Kansas nor the Oklahoma plan provides for the possibility that the statistical methods fail to capture (thus fail to penalize SWBT for) all missed measures, known as Type II errors. In contrast, SWBT's methodology does account for errors in the other direction, i.e., where SWBT might be shown to have worse performance than is actually the case. The KCC Staff observed that "[t]he CLECs are rightfully concerned about *test results* that show SWBT's performance is in compliance when, in fact, SWBT has not actually performed up to the performance standards." Kansas Staff Recommendation, Section II at 61 (italics in original). The KCC Staff recognized the severe enforcement consequences of this problem:

> [T]here may be situations when the CLECs complain they are being discriminated against and yet the test results show otherwise. In these situations the Commission should be aware that the test results *could be false*. For this reason, Staff recommends to the Commission that CLEC complaints be carefully evaluated, mindful that a Type II error could be at the source of the complaint. It would be a mistake for CLEC complaint[s] to be *routinely* dismissed based simply on SWBT presenting test statistics that show compliance. It is important to be aware that what the tests show may not be the reality.[92]

Notwithstanding these profound problems, the Staff expressed the view that this matter would be too difficult to resolve in the timeframes allowed for the state's 271 process, and again deferred it for future review. Kansas Staff Recommendation at 136.

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[92] Kansas Staff Recommendation, Section II at 62 (italics in original).

Second, the KCC Staff observed that Z-tests may not be appropriate for benchmark performance measures because it allows SWBT "'wiggle-room' which may enable it to pass the test [and essentially result] in the fixed benchmark [being] reduced." Kansas Staff Recommendation, Section II at 45. In Texas, the PUC determined to stop using Z-tests for almost 100 benchmark measures. However, in Kansas, 78 benchmark measures continue to use Z-tests. The KCC Staff stated that the application of Z-tests to benchmark performance measurements may serve as a detriment to CLECs and that it "fully expects the application of Z-tests (as part of the benchmark testing) to be completely eliminated, or nearly so." Id. But the KCC Staff deferred remedy of this problem to the future as well.

Third, the KCC Staff expressed its concern that "the derivation of the 'K' Table values [which permit SWBT certain exclusions for missed measures due to random variation] may lack analytical rigor." Kansas Staff Recommendation at 132. The Staff agreed with CLECs that by allowing the K exclusions, SWBT's incentive to meet some performance measurements may be reduced and its liquidated damages obligation to CLECs may be diminished. However, once again, the Staff left for the future the determination as to whether the K Table values are analytically correct. Kansas Staff Recommendation, Section II at 58.

Given the fact that numerous problems were identified but not corrected, neither the KCC nor the OCC have fashioned Performance Remedy Plans that meet the FCC's requirement that enforcement plans be designed to detect and sanction poor performance when it occurs. See New York Order ¶ 433.

B. SWBT Has Not Provided Reasonable Assurances That The Data It Is Reporting Under The Performance Measurements Is Accurate.

As discussed above, the FCC has stated that, in order to find a performance plan effective, there must be reasonable assurances that the data reported pursuant to enforcement mechanisms is accurate. Id. Furthermore, it has subsequently clarified and emphasized that "the reliability of reported data is critical, and that properly validated metrics must be meaningful, accurate, and reproducible." Texas Order ¶ 428.

Reliable, auditable state-specific results reported by SWBT for Kansas and Oklahoma are essential to determinations of Section 271 compliance. In reviewing the data submitted by Bell Atlantic in New York, the FCC relied upon the New York Commission's efforts to "independently replicate[ ] Bell Atlantic's performance reports from raw data submitted by Bell Atlantic, in order to identify and investigate any discrepancies . . . ." New York Order ¶ 442. Likewise, in Texas the PUC required an extensive reconciliation process of SWBT's data in Texas. However, neither the KCC nor the OCC have engaged in processes to confirm SWBT's data as the New York or Texas Commissions did. In fact, the Kansas Staff openly acknowledged that it did not have the time for an adequate validation of SWBT's data, stating that "given the limited amount of time to review this application, a thorough examination of the source data would have been very difficult." Kansas Staff Recommendation at 135 (also noting Staff's agreement with AT&T's concern for validity of SWBT data).[93]

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[93] See AT&T's Comments Regarding Kansas Staff Recommendation at 21-22 (KCC Aug. 31, 2000) (App. C, tab 274) ("AT&T has shown Kansas-specific errors in recent performance reports which SWBT has acknowledged in reply. SWBT admits that it has mistakenly omitted Kansas CLEC transactions from Kansas reports and mistakenly included those transactions in Missouri data. And these were not idiosyncratic, manual

SWBT attempts to wash over this problem by referring to the Snavely King report, which it describes imaginatively as concluding that "SWBT's data gathering processes were sufficient." SWBT Br. at 67 (citing Dysart Aff. ¶ 206). It also claims that "[t]his audit provides further support for the adequacy of SWBT's performance measurements, and for the reliability and accuracy of its reported data. " Id. But the Snavely King Report did no such thing. In fact, the Report documents the *absence* of any validation of SWBT's data. The Report took specific note of Texas' requirements that SWBT and CLECs in Texas reconcile conflicting data, as well as Texas' ordering of special studies of performance indicia not captured by the current set of performance measurements. While suggesting reasons for the absence of such undertakings by the KCC, the Consultants nevertheless insisted that the possible reasons "do not absolve SWBT from ensuring that its records and those of CLECs are at least reasonably consistent. *At present, there has been no testing of this issue in Kansas*." Snavely King Report at 12 (emphasis added).

The same problems are present for the Oklahoma data. As AT&T documented to the OCC, there were substantial indicia on the record of errors throughout SWBT's reported data. Indeed, the OCC staff had expressed concerns in the Oklahoma Performance Measurements Docket (99-131) for "systematic error and bias" in SWBT's data. See AT&T Proposed Findings of Fact and Conclusions of Law at 38 (OCC Sept. 26, 2000) (App. C, tab 274) (quoting OCC Staff's Opinion in Dkt. 99-131); Eva Fettig Direct Testimony on Behalf of AT&T at 9 (OCC Aug. 17, 2000) (App. C, tab 198). Moreover, like Kansas, the small number of data points undermine any confidence in an effective enforcement plan.

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errors. Rather, correcting these errors will require revision to SWBT programming codes 'to assign the data associated with PM 65 to the correct state.'") (citation omitted).

Finally, the FCC requires that the BOC's raw data underlying the performance measurements "be stored in a secure, stable, and auditable file." Texas Order ¶ 428. This requirement permits state commissions and CLECs to check the data and reconcile it with their own data. In Kansas, the Staff recommended that new performance measures be established to determine whether SWBT is providing its raw, source data to CLECs in a timely fashion due to the fact that a CLEC had complained that SWBT has not provided the data in a reasonable and timely manner. See Kansas Staff Recommendation at 136. Without timely access to the data used by SWBT, CLECs are delayed in verifying whether SWBT is complying with Section 271, and the value of the Performance Remedy Plan is again reduced.

Based on the foregoing problems, the Performance Remedy Plans for Kansas and Oklahoma cannot be viewed as probative evidence that SWBT will meet its 271 requirements in the future. To the contrary, they confirm that more work is required in both states along a number of issues before SWBT's entry into long distance in these states will be consistent with the public interest.

CONCLUSION

For the foregoing reasons, SWBT's joint application for Section 271 relief in Kansas and Oklahoma must be denied.

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Dated: November 15, 2000

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CERTIFICATE OF SERVICE

I, S. Anna Sucin, do hereby certify that on this 15th day of November, 2000, copies of the foregoing Petition to Deny of Sprint Communications Company L.P. on Southwestern Bell Section 271 Application in Kansas and Oklahoma, CC Docket No. 00-217, will be hand-delivered on November 16, 2000, unless otherwise indicated, to the following parties:

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